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Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY, PETITIONERS,

vs.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 10, 1937.

CERTIORARI GRANTED OCTOBER 25, 1937.

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TRANSCRIPT OF RECORD

INTRODUCTION.

THE UNITED STATES OF AMERICA,
Western District of South Carolina, to-wit:

At a District Court of the United States for the Western District of South Carolina begun and held at the Federal Building in the city of Rock Hill on the 2nd day of June, 1937.

Present: The Honorable J. Lyles Glenn, District Judge for the Western District of South Carolina.

Among other were the following proceedings, to-wit:

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

In Equity No. 451

BILL OF COMPLAINT.

(2) Filed Nov. 7, 1934.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.
IN EQUITY.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

v.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, Defendants.

The plaintiffs, Duke Power Company and Southern Public Utilities Company, for their cause of action against the defendants, allege:

I.

The plaintiff, Duke Power Company, is a corporation duly organized and existing under the laws of the State of New Jersey, and is a citizen and resident of said State. It is domesticated under the laws of the State of South Carolina relative to foreign corporations doing business in that State; it has duly filed in the office of the Secretary of State of said State a written declaration designating Winnsboro, Fairfield County, as its principal place of business therein, and has otherwise duly complied with all the laws of said State, and is duly authorized and licensed to conduct and carry on its business in said State.

II.

(3) The plaintiff, Southern Public Utilities Company, is a corporation duly organized and existing under the laws of the State of Maine, and is a citizen and resident of said State. It is domesticated under the laws of the State of South Carolina relative to foreign corporations doing business in that State; and it has duly filed in the

Office of the Secretary of State of said State a written declaration designating Anderson, Anderson County, as its principal place of business therein, and has otherwise duly complied with all the laws of said State, and is duly authorized and licensed to conduct and carry on its business in said State.

III.

The defendant, Greenwood County, is a body politic and corporate duly organized and existing under the laws of the State of South Carolina; it is located in the Western District of said State, is a citizen thereof, and has legal capacity to sue and be sued.

The defendants, E. L. Brooks, S. A. Agnew and E. I. Davis, each and all of them, are citizens of the State of South Carolina, residing in Greenwood County, in said State, and in the Western District thereof. They are members of and constitute The Finance Board for Greenwood County, which was duly created by Act No. 430 of the General Assembly of South Carolina, approved March 23, 1931, as the governing body of said County. Said Board is charged, among other duties, with the duty of handling the fiscal affairs of said County, and has its office in the City of Greenwood in said County.

IV.

The jurisdiction of this Court is invoked and depends upon the following grounds:

(a) This suit is one of a civil nature in equity and is between citizens of different States, in that the plaintiff, Duke Power Company, is a citizen of the State of New Jersey, the plaintiff, Southern Public Utilities Company, a citizen of the State of Maine, and the defendants, each and all of them, are citizens of the State of South Carolina.

(4) (b) The suit, in addition to being one between citizens of different States, also arises under the Constitution and Laws of the United States, as hereinafter particularly alleged.

(c) The matter in controversy in this suit, as it affects and concerns each of the plaintiffs, exceeds, exclusive of interest and cost, the value of $3,000, in that the direct pecuniary loss, which each plaintiff will suffer unless the defendants are enjoined and restrained from the commission of the alleged wrongful and unlawful acts and conduct hereinafter complained of, as well as the value of the property rights of each plaintiff for which protection is herein sought, very largely exceeds, exclusive of interest and cost, the sum of $3,000.

V.

Southern Public Utilities Company is wholly owned subsidiary of Duke Power Company. Together these corporations constitute what is known as the Duke Power System, and are hereafter together referred to as the "Duke System". Each of said corporations owns valuable property, both real and personal, located in said County of Greenwood, as well as elsewhere in the State of South Carolina, and is a large payer of taxes to the State of South Carolina and to various of the Counties of said State, including the County of Greenwood, as well as to the Government of the United States.

VI.

The Duke System is now, and for a number of years last past has been, engaged in the business of furnishing electric light and power service to the cities, towns and communities and to the citizens, residents and industrial enterprises in the following Counties in the State of South Carolina, to-wit: York, Cherokee, Spartanburg, Greenville, Pickens, Oconee, Anderson, Chester, Laurens, Newberry, Lancaster, Abbeville, Greenwood and Kershaw. Said System has secured and now owns and uses for this purpose valuable franchises and operating rights in 54 cities and towns in said Counties, including most of the principal cities and towns in said Counties, 10 of (5) said cities and towns being located in the Counties of Greenwood, Newberry and Laurens, in which three Counties the defendant, Greenwood County, intends through its proposed Buzzard Roost Project (hereinafter complained of) to engage in the generation, distribution and sale of electric power in competition with said Duke Sys-

tem, as hereinafter more particularly stated. Each of said corporations composing said Duke System is an electrical public utility under the laws of the State of South Carolina and subject to the jurisdiction and regulation of the Railroad Commission under, as well as to the benefit and protection of, the Act entitled "An Act Regulating Persons, Corporations, and Municipalities engaged in the Generation, Transmission, Delivery or Furnishing of Electricity for Light, Heat or Power, etc.", approved April 8, 1932, and the amendments thereof and thereto.

VII.

Said Duke System, in order to conduct its said business in said State, carry out the terms of its said franchises and operating rights, and perform the functions and duties of the said corporations composing said Duke System as public service corporations, has invested a great many millions of dollars in generating, transmission and distribution facilities for the production, sale and distribution of electric power or energy and are under obligation by virtue of the Laws of the State of South Carolina to continue to maintain and operate these facilities for the purpose of serving the territory in which the Duke System does business as aforesaid. The generating facilities available for this service consist primarily of hydro-electric plants, supplemented with storage reservoirs and with steam capacity. At present the total installed capacity of these generating facilities available for serving the territory in said State in which said Duke System does business in 883,705 killowatts. Said Duke System now owns and operates in said State 2,695.38 miles of transmission and distribution lines, including transmission and distribution lines owned and operated by said System in Greenwood, Newberry and Laurens Counties, which are connected with all the said generating facilities of said System. These generating, (6) transmitting and distributing facilities of said Duke System are available for and adequate to meet all requirements for electric service which now exists, or for years to come may hereafter exist, in said Counties.

VIII.

The defendant, Greenwood County, is proceeding to construct and operate, and unless prevented by this Honorable Court will construct and operate on the Saluda River in the State of South Carolina, at a point known as "Buzzard Roost", a project or works (hereinafter referred to as the "Buzzard Roost Project"), consisting of a hydro-electric plant with transmission and distribution lines extending into and through the Counties of Greenwood, Newberry and Laurens, for the purpose of engaging in the business of furnishing electric current and power to cities and towns, to industrial enterprises, to private individuals, and to the public generally within and without the boundaries of said Greenwood County for domestic, commercial and industrial uses, as more particularly set forth in that certain resolution adopted by The Finance Board for Greenwood County on October 6, 1934, a copy of which is hereto attached, marked Exhibit "I", and made a part of this bill of complaint, and also as set forth in the application filed by said County on September 13, 1934, with the Federal Power Commission for a license for said project, as shown by the extract from said application hereto attached, marked Exhibit "II", and made a part of this bill of complaint.

IX.

The application of said County to the Federal Power Commission states that the total cost of said Buzzard Roost Project, including all necessary lands, materials, rights of way, labor and supplies, for constructing and equipping the plant, and the transmission and distribution lines which will constitute said project, will be the sum of $2,767,000, and said resolution of October 6, 1934, declares that an estimate of the costs of said project has been made and filed with The Finance Board of Greenwood County by engineers theretofore employed for that (7) purpose, and that the amount of such estimate is $2,767,000, which estimate is adopted and approved by said resolution. The application to the Federal Power Commission further states that: "The project will sell approximately 30,000,000 K. W. H. yearly of Primary Power and 20,000,000 K. W. H. yearly of Secondary Pow-

er''. The rates at which the County is selling and offering for sale power that may be produced by said project are set forth in the extract from said application hereto attached as Exhibit ''II''.

X.

Duke System is informed and believes, and therefore alleges and charges, that the defendant County has made application to the Administrator of Public Works, created under Title II of the National Industrial Recovery Act, for the sum of $2,767,000 to be used by said County in defraying the cost of constructing said Buzzard Roost Project, the same to consist of a grant of $547,000 to said County and a loan of $2,200,000 to said County upon bonds to be issued as set forth in said resolution (Exhibit ''I'') and which will be so issued by said County unless said County is restrained by this Honorable Court from so doing.

XI.

The Duke System is informed and believes, and therefore alleges and charges, that said County has entered into, or intends to enter into, and will enter into, unless restrained by this Honorable Court, a contract with the United States of America whereby it will undertake, covenant and agree to complete said Buzzard Roost Project in all respects, notwithstanding said project may cost in excess of said $2,767,000; and said Duke System is further informed and believes, and therefore alleges and charges, that in and by the terms of said resolution (Exhibit ''I'') and of the bonds that have been or may be issued pursuant thereto said County irrevocably undertakes, covenants and agrees to operate said Buzzard Roost Project and maintain the same in good condition, regardless of the incomes and revenues that may be de-
(8) rived therefrom; and said Duke System is further informed and believes, and therefore alleges and charges, upon the facts herein stated, that said undertakings, covenants and agreements of said County in and by said contract and in and by said resolution and the bonds issued or to be issued thereunder are, and each of the same will be, an indebtedness and obligation of said

County and its taxpayers which will constitute a general liability of said County and its taxpayers; and said Duke System is further advised and believes, and therefore alleges, that said County has no authority to enter into any contract, covenant or agreement pledging its general credit or creating a general liability against said County and its taxpayers, for the construction or operation of said project.

XII.

The Duke System has caused said application, and the plans and estimates accompanying it, to be carefully and thoroughly studied by competent engineers, and is informed by them and believes, and therefore alleges:

1. That said Buzzard Roost Project will cost at least $976,961 more to construct, as designed in said application, than the cost of $2,767,000 as set forth in said application;

2. That the design of said project as set forth in said application does not make adequate provision for the safety of the structures thereof, nor adequate provision against damage to property above the dam, and for the protection of life and property below said dam, and in order to construct said project with reasonable safety to said structures, and with reasonable safeguards for the protection of life and property, it will cost at least $1,217,591 more to construct than the cost of $2,767,000 estimated therefor in said application;

3. That the primary power available for sale from said project will not exceed 25,750,000 K. W. H. per year; and that the secondary power available for sale from said project will not exceed (giving the project the ad-
(9) vantage of averaging good water years with low water years) 10,000,000 K. W. H. per year;

4. That the necesary cost of operating said project, including in such cost the provisions and reservations (other than a reserve for improvements, betterments and extensions), required by Sec. 21 of said Act No. 299 of the Acts of 1933, will not be less than $341,273 per year;

5. That at the rates for power fixed in said resolution (Exhibit "I") as well as at the rates for power which said application, in the extract therefrom attached as Exhibit "II", shows Greenwood County is selling and offering to sell such power, the annual revenues from the sale of power produced by such project, assuming the sale of every available kilowatt hour of such power, will not exceed $268,875 per year; and such project at said rates will not be self-liquidating, but on the contrary at such rates for such power said project will be a losing venture that must inevitably fail.

The Duke System is further informed, advised and believes, and therefore alleges, that said project will not be able to sell continuously every available K. W. H. of such power; that as a matter of fact the annual revenues from the sale of power produced by said project will be substantially below the above stated amount of $268,875; and that in order for said County to complete said project and to operate and maintain the same in accordance with the covenants and agreements it has made, or intends to make, in these respects as hereinbefore alleged, it will be necessary for said County, under and by reason of the general liability imposed upon said County and its taxpayers by said covenants and agreements, to raise and expend by means of its general credit at least the sum of $1,217,591 for the completion of said project and at least the sum of $72,000 annually for the operation and maintenance of said project, assuming the sale of every available K. W. H. of both primary and secondary power, an ideal impossible of attainment in actual operation, and even if said project should be able to sell as much as ninety (90%) percentum of all the available K. W. Hrs. (10) of such power the annual deficit for operation and maintenance would be approximately $100,000.

XIII.

Said Duke System is informed and believes, and therefore avers and charges, that said County in all matters pertaining to the said Buzzard Roost Project is represented by and acting through the said The Finance Board of Greenwood County, consisting as above alleged of E. L. Brooks, S. A. Agnew and E. I. Davis, the members thereof.

XIV.

The Duke System through the use of its properties, facilities, franchises and operating rights, hereinbefore described, and under written contracts and at rates approved by the Railroad Commission of South Carolina under the various Regulatory Acts of said State, including the Act approved April 8, 1932, and the amendments thereto, is now, and for a number of years has been, furnishing electric current and power to the principal customers with whom Greenwood County has entered into contracts, and with whom it proposes to enter into contracts, for the sale of electric power and current from said Buzzard Roost Project.

XV.

Said Duke System is informed, advised and believes, and therefore alleges and charges, that the Acts of the General Assembly of the State of South Carolina, under which said County proposes to construct and operate said Buzzard Roost Project, secure funds and enter into covenants and agreements for that purpose, do not authorize said County to construct and operate said project or to enter into covenants and agreements for that purpose, except under facts and circumstances that will ensure that said project will be a self-liquidating and self-supporting project, constructed wholly out of special funds obtained by grant or through the issue of bonds, as in said Acts authorized, in a manner that will not constitute any liability whatever upon the said County or its (11) taxpayers or make necessary recourse to the general funds of the County or the pledging of its general credit; that under the facts and circumstances of this case, as herein alleged, said project will not be self-liquidating and self-supporting, the said grant and loan aggregating $2,767,000 which said Court proposes to secure as hereinbefore alleged for use in the construction of said project will be totally inadequate for the construction thereof, and it will be necessary for said County to pledge its general credit or have recourse to its general funds and involve itself and its taxpayers in pecuniary liability for the construction and operation of said project; and that therefore said County is not authorized by said Acts, or any of them, to construct and operate

said Buzzard Roost Project, and the construction and operation thereof as proposed under the facts of this case will constitute illegal competition with the Duke System and the said business, franchises and properties thereof and on that account should be enjoined and restrained by this Honorable Court.

XVI.

The Revenue Bond Act of the State of South Carolina (No. 299) approved May 8, 1933 (38 Stat. at Large 411), provides that the rates charged for services furnished by projects acquired or constructed under it shall not be subject to supervision or regulation by any State bureau, board, commission or other like instrumentality or agency thereof. In lieu of such supervision and regulation said Act provides, particularly in and by Sec. 21 thereof, that rates for services furnished by any project, so acquired or constructed, shall, precedent to the issuance of any bonds under said Act, be fixed by ordinance in an amount that shall be sufficient to provide from the revenues of said project, for payment of the interest and principal of all such bonds as and when the same become due and payable, for creating a bond and interest redemption fund therefor, for payment of the expenses of administration, operation and maintenance of such project in good repair and working order, for building up a proper reserve for depreciation of said project, and for building up a proper reserve for improvements, betterments and extensions of said project. The Act of
(12) said State (No. 1095) approved April 12, 1934 (38 Stat. at Large 2020) which authorizes the Finance Board for Greenwood County to borrow funds from the Public Works Administration for the construction of said Buzzard Roost Project specifically requires that bonds issued under said Act for such funds shall be issued "in accordance with the terms, conditions and powers granted and given in Act No. 299 of the Acts of the General Assembly, 1933, including all amendments thereto."

In the said application filed by said County with the Federal Power Commission there are stated certain rates upon the basis of which said County has entered into contracts, and is endeavoring to enter into still further contracts, for the sale of power produced by said Buzzard Roost Project to those who are now, and for a

number of years have been, customers of these plaintiffs under written contracts, at rates duly established by the constituted authorities of the State of South Carolina, as more particularly set forth in the extract from said application (hereto attached as Exhibit "II"). Said Finance Board of said County in and by said Resolution (hereto attached as Exhibit "I") has fixed the rates therein stated for the power produced by said Buzzard Roost Project and on the basis of said rates is proposing to issue, and will issue unless restrained by this Honorable Court, bonds for securing funds for the construction of said Buzzard Roost Project as in said resolution set forth.

Said Duke System is informed and believes, and therefore avers and charges, that upon and by reason of the facts and things herein stated said rates thus stated in said application and thus fixed in said resolution are, and will be, entirely inadequate to meet the requirements of said Acts with respect to said rates and do not and will not constitute a compliance with said requirements of said Acts as respects said Buzzard Roost Project, on which account the fixing of said rates, the issuing of bonds on the faith of said rates, the making of contracts on the basis of said rates for the power produced by said project, as well as any act or thing done in or about the construction and operation of said Buzzard Roost Project on the basis of any such rates will (13) be, and is, wholly unauthorized and illegal and, if permitted to continue, will constitute illegal competition with the Duke System and the business, franchises and properties thereof, to the great and irreparable injury of the same; and that all and every action or actions on the part of said County in connection with or in furtherance of said Buzzard Roost Project on the basis of said inadequate, insufficient and unlawful rates should be enjoined and restrained by this Honorable Court as wholly unauthorized and illegal.

XVII.

An essential, inseparable and indispensable part of said Buzzard Roost Project, as shown by said resolution of October 6, 1934, pursuant to which the County proposes to construct, operate and finance said project, and also as shown by said application filed with the Federal

Power Commission, is its construction for and use in the sale and distribution of electric current and power as a public utility business to cities and towns, industrial enterprises, private individuals, and the public generally, outside the limits of said County, for general domestic, commercial and industrial uses, such sale and distribution outside the limits of said County being a principal part of the proposed business of said project. Said Duke System is advised and believes, and therefore alleges and charges, that said County has no authority to construct and operate said project for the purpose of thus selling and distributing electric current and power and thereby conducting a public utility business beyond the limits of said County. Said Duke System therefore alleges and charges that any construction or use of said project as a public utility business for such sale and distribution of power produced thereby to customers located beyond the limits of said County, as said County proposes to do, is and will be an illegal and *ultra vires* act on the part of defendants, and will constitute illegal competition with said Duke System, and the business, franchises and property thereof, to the great and irreparable injury of same, on account whereof any such construction or use of said project by the defendants should be enjoined and restrained by this Honorable Court.

(14) XVIII.

Said Duke System is informed, advised and believes, and therefore alleges and charges:

(1) That said Buzzard Roost Project is intended to be, and will be, constructed and operated as a purely local enterprise; it is not intended to engage, and will not engage, in interstate commerce; neither its construction nor operation would promote the general welfare of the United States within the meaning of the Constitution of the United States; and it is not a part of or included within the "comprehensive program of Public Works", which said National Industrial Recovery Act in and by Sec. 202 thereof requires the Administrator under the direction of the President to prepare; that said Buzzard Roost Project is not such a project as may be constructed or financed, or in the aid of which funds

may be granted or loaned, by the Administrator under the provisions of Sec. 203 of said National Industrial Recovery Act; that the Congress of the United States, in and by said National Industrial Recovery Act, has not authorized the granting or lending of Federal Funds for the construction of such a project as said Buzzard Roost Project; that the Administrator of Public Works is not authorized to make and the County of Greenwood is not authorized to receive and accept, any Federal Funds by grant, loan or otherwise, for the construction or operation of said project; that the receipt and acceptance of any such loan and grant from the Public Works Administration, as well as the use of any funds so obtained in the construction and operation of said project, will be contrary to the terms of the National Industrial Recovery Act respecting the making of loans and grants by the Public Works Administration, and render said Greenwood County and the taxpayers thereof liable for the return of any such funds so received, with legal interest thereon, and also render illegal the operation of said project in competition with said Duke System and the business, franchises and properties thereof.

(2) That if said National Industrial Recovery Act purports to authorize the use of Federal Funds for the construction and operation of said Buzzard RoostProject, (15) said Act, in so far as it purports to authorize the use of such funds for such purpose, is unconstitutional, null and void, in that the Congress of the United States has no power to authorize the use of such funds for such purpose under either the general welfare clause contained in Article I, Sec. 8, Clause 1, of the Constitution of the United States, or the Commerce Clause contained in Clause 3 of said Section of said Constitution, or under any other clause or provision of said Constitution, such an Act is forbidden to Congress by the due process clause of the 5th Amendment to said Constitution, and such power is expressly withheld from the Congress of the United States by Article X of said Constitution.

(3) That should said Buzzard Roost Project be constructed and operated with any such Federal Funds so obtained, then such construction and operation of such project will constitute and be an illegal competition by

and on the part of the defendants with the valuable properties, franchises, operating rights and business of said Duke System, built up and acquired through years of effort at the expenditure of many millions of dollars, and wrongfully cause the said Duke System great and irreparable injury, on which account said Duke System has a right to complain of said threatened competition and to have the same enjoined and restrained because of the illegality thereof.

XIX.

As hereinbefore stated, Duke System is informed, advised and believes, and therefore alleges and charges, that said County, acting by and through said Finance Board, either has entered into or intends to enter into a contract with the United States of America, obligating itself to complete said Buzzard Roost Project regardless of how much the completion thereof may cost in excess of said loan and grant of $2,767,000; that the construction of said Buzzard Roost Project will cost at least the sum of $1,217,591 in excess of said $2,767,000; that said contract will constitute, and is intended to constitute, for the amount of such excess cost, a general (16) liability upon said County and its taxpayers; that the obligation of said County to defray such excess cost under said contract for the construction of said Buzzard Roost Project, together with the existing bonded indebtedness of said County, will amount to more indebtedness in the aggregate than eight percentum (8%) of the value of all taxable property within said County as valued for State taxation; and therefore said contract, as well as any part or portion of any Act of the General Assembly of the State of South Carolina authorizing or purporting to authorize said contract, is and will be contrary to and in violation of Art. X, Secs. 5 and 6, of the Constitution of the State of South Carolina, and hence illegal and void, on which account the making of said contract to complete said project by or on behalf of said County, or the performance thereof, if said contract has already been entered into by said County, should be enjoined and restrained by this Honorable Court.

XX.

The Duke System is advised and believes, and therefore avers and charges: That the Sections of the National Industrial Recovery Act, which created the Public Works Administration and authorized the granting and lending of Federal Funds thereby, properly construed, do not authorize the making of such loans upon bonds payable as to principal and interest solely from the proposed project and revenues thereof, such as those authorized by said Act. No. 299 as originally enacted, but authorizes such loans only to existing municipal entities upon the faith and the credit of such entities; that in recognition thereof Act. No. 902 of the State of South Carolina, approved April 12, 1934, in and by Sec. 1-D thereof, amended said Act No. 299 by repealing "all sections, provisions and clauses" of said Act "in so far as the same are in conflict with the Public Works Administration Act" (meaning thereby Title II of the National Industrial Recovery Act) in order to enable a city, county, township or municipality acquiring or constructing a project under said Act No. 299 "to qualify for the securing of the loan available from the Public Works Administration of the Federal Government" for financing said project; that said Act No. 1095, approved April 12, 1934, which au-
(17) thorizes the Finance Board of Greenwood County to do any and all acts necessary and incident to securing a loan from the Public Works Administration for said Buzzard Roost Project, expressly requires that the "bonds or securities" issued thereunder for such loans shall be "in accordance with the terms, conditions and powers granted and given in said Act No. 299 of the Acts of the General Assembly, 1933, including all amendments thereto"; that by reason of said terms of said National Industrial Recovery Act and of said amendment of said Act No. 299 the Public Works Administration is not authorized to accept; for any such loans for said Buzzard Roost Project, bonds which are payable as to principal and interest solely from said project and the revenues thereof, but only bonds which will constitute indebtedness for which said Greenwood County, as well as the taxpayers thereof, will be generally liable, and that such bonded indebtedness, as is thus required by the terms of said National Industrial Recovery Act and of said amendment of said Act No. 299, which said County

proposes to contract for the construction of said project, taken together with the existing bonded indebtedness of said County, will make an aggregate of indebtedness of said County greater than eight percentum (8%) of the value of all taxable properties in said County, as valued for State taxation, and will constitute indebtedness created by said County and bonds issued by said County contrary to the provisions of Secs. 5 and 6 of Article X of the Constitution of the State of South Carolina and said County is unauthorized to create such indebtedness or to issue such bonds or to borrow or secure funds by virtue thereof, and said County should be wholly enjoined and restrained by this Honorable Court from so doing.

XXI.

The Supreme Court of the State of South Carolina on October 31, 1934, filed its opinion in the case of Park v. Greenwood County, et al. A true copy of said opinion is attached hereto as Exhibit "III". In said opinion said Court stated and grouped "the issues made by the pleadings" in said case as follows:

(18) "1. May the Legislature permit or authorize a county to construct and operate a hydro-electric plant for the uses referred to above?

"2. Do the revenue bonds issued, or here sought to be issued, pursuant to the act of May 8, 1933, constitute debts within the limitations of Section 7 of Article VIII, and sections 5 and 6 of Article X of the Constitution?

"3. Does the proposed ordinance, submitted as an exhibit to the pleadings, comply with the provisions of the act of May 8, 1933?"

Said action was a friendly litigation, instituted, as plaintiffs are informed and believed, by the plaintiff therein at the request of the defendants therein. In said action the plaintiff, Dr. R. H. Park, as a taxpayer of said County of Greenwood, sued on behalf of himself and other like taxpayers, to restrain said County from proceeding with said Buzzard Roost Project because of certain provisions of the Constitution of said State upon

which the complaint in said action relied for the injunctive relief it prayed. A true copy of the original complaint and of the answer and return thereto, both filed September 26, 1934, are hereto attached as Exhibits "IV" and "V", respectively. Said Duke System being, as hereinbefore stated, taxpayers of said County, with large properties therein, and greatly threatened and affected by said project, filed in said action a petition praying leave to interplead therein. A true copy of said petition is hereto attached as Exhibit "VI". The return of the plaintiff and of the defendants to said petition resisted the prayer thereof on the ground that the granting to the Duke Sysem of the privilege of interpleading in said action would change the issues presented by the pleadings in said action and delay the consideration of and decision in said action. True copies of said two returns are hereto attached as Exhibits "VII" and "VIII", respectively. By order entered October 9, 1934 (a true copy of which is hereto attached as Exhibit "IX") said Court refused said petition to interplead and denied the Duke System the right to become a party to said action, but accorded the Duke System the privilege "if they so desire, to file an argument in this case (19) upon the issues made by the pleadings" at the hearing in said action, which said order set for October 12, 1934. Said order, in effect, confined the Duke System to the mere filing of a brief *amicus curiae* in said action and thereby excluded, and was intended to exclude, the Duke System not only from presenting any facts or issues in said action not already presented by the pleadings therein, but even from any control over or with respect to the issues or facts presented by the pleadings in said action or that might thereafter be presented in said action. At the hearing of said action on October 12, 1934, an amendment of the complaint therein was filed by the consent of the parties thereto. A true copy of said amendment is hereto attached as Exhibit "X", the resolution therein referred to being the resolution, a true copy of which is hereby attached as Exhibit "I". But said Duke System did not appear in said action at such hearing, by argument or otherwise, as it could not by reason of said order present and have considered, as it had intended to do in said action, the facts and issues set forth in this bill of complaint, and said facts and

issues were not presented in or considered by the Supreme Court of said State in said action.

XXII.

The plaintiffs have no remedy in the premises, except in a Court of Equity, and unless the defendants are enjoined and restrained from proceeding with the construction and operation of said Buzzard Roost Project and from issuing bonds, securing funds, making contracts and doing any other acts and things in furtherance of such project, each of the plaintiffs will suffer serious and irreparable injury therefrom and thereby in its business, franchises and property in the respects and for the reasons hereinbefore set forth.

WHEREFORE, said Duke Power Company and Southern Public Utilities Company pray, and each prays:

(1) For the writ of subpoena of the United States directed to said defendants and requiring them, and each of them, to make full, true and direct answer to this (20) bill of complaint, but not under oath, answers under oath being hereby expressly waived.

(2) For a perpetual injunction, permanently enjoining and restraining the defendants, and each of them, from constructing and operating said Buzzard Roost Project and from issuing bonds, securing funds, making contracts and doing any other acts and things in furtherance of such project.

(3) For all such other and further general relief as to equity may seem meet or the nature of the case require.

H. J. HAYNSWORTH,
W. R. PERKINS,
J. H. MARION,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs.

EXHIBIT I.

P. W. 19931.

A RESOLUTION PROVIDING FOR THE ISSUANCE OF TWO MILLION TWO HUNDRED TWENTY THOUSAND DOLLARS ($2,220,000) REVENUE BONDS, OF THE COUNTY OF GREENWOOD, SOUTH CAROLINA, FOR THE CONSTRUCTION OF A HYDRO-ELECTRIC POWER PLANT IN ACCORDANCE WITH THE PROVISIONS OF ACT 299, ACT OF SOUTH CAROLINA, 1933, AS AMENDED, AND ACT 1095, ACT OF SOUTH CAROLINA, 1934.

BE IT RESOLVED BY THE FINANCE BOARD OF GREENWOOD COUNTY, SOUTH CAROLINA, AS FOLLOWS:

Section 1. It is hereby determined and declared that an estimate of the cost of constructing a hydro-electric plant, comprising an earthen dam across Saluda River, a 15,000-K. W. generating station with necessary control equipment and approximately 190 miles of high and low tension distribution lines, for the purpose of (21) furnishing electric current and power to private individuals, corporations, and municipalities within and without the boundaries of the County for domestic, commercial and industrial use, such project, and any improvements and extensions which may be made thereto, being hereinafter referred to as the "system", has heretofore been made and filed with this body at its instance by engineers heretofore employed for that purpose, and that the amount of such estimate is TWO MILLION, SEVEN HUNDRED SIXTY-SEVEN THOUSAND DOLLARS ($2,767,000) which estimate is hereby adopted and approved.

Section 2. That in order to provide for the payment of the costs, in excess of the grant made to the County of Greenwood by the United States of America, of constructing the improvement described in Section 1 hereof, there shall be issued TWO MILLION, TWO HUNDRED TWENTY THOUSAND DOLLARS ($2,220,000), of County of Greenwood, Hydro-electric Revenue Bonds of the County of Greenwood, South Caro-

lina, dated October 1, 1934, of the denomination of $1,000, numbered from one to 2,200 inclusive bearing interest at the rate of four per centum (4%) per annum, payable semi-annually on October 1, and April 1, of each year, beginning April 1, 1934; said bonds shall mature serially on the first day of October of each year as follows, to-wit:

Year	Amount	Year	Amount
1937	$50,000	1951	$80,000
1938	50,000	1952	80,000
1939	55,000	1953	85,000
1940	55,000	1954	85,000
1941	60,000	1955	90,000
1942	60,000	1956	90,000
1943	65,000	1957	95,000
1944	65,000	1958	95,000
1945	65,000	1959	100,000
1946	70,000	1960	100,000
1947	70,000	1961	105,000
1948	70,000	1962	105,000
1949	75,000	1963	110,000
1950	75,000	1964	115,000

(22) Said bonds together with interest thereon, shall be payable only out of the Bond and Interest Redemption Account hereinafter created and shall be a valid claim of the holders hereof only against said fund, and the income and revenues of the system pledged to such fund.

Section 3. Said bonds and coupons when issued shall be in substantially the following form:

No. $1,000.00

UNITED STATES OF AMERICA
STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

HYDRO-ELECTRIC POWER
REVENUE BOND

The County of Greenwood, State of South Carolina, hereby acknowledges itself indebted and for value received promises to pay to the bearer, or if this bond be registered, to the registered holder hereof from the revenue hereinafter described the sum of

ONE THOUSAND DOLLARS ($1,000)

on the first day of October, 19...., and to pay interest on said sum from the date hereof until paid, at the rate of four per cent (4%) per annum, payable semi-annually on the first days of April and October in each year, upon presentation and surrender of the annexed interest coupons as the same severally mature, both principal and interest being payable in lawful money of the United States of America at the office of the County Treasurer of Greenwood County in the City of Greenwood, South Carolina, or at the option of the holder at the Guaranty Trust Co. in the Borough of Manhattan, City and State of New York.

This bond is one of a series of bonds of like date and tenor except as to maturity, and is issued pursuant to Act No. 299 of the Acts of 1933 of South Carolina, as amended, Act 1095, Acts of 1934 of South Carolina and a resolution duly adopted by the Finance Board of Greenwood County on the 6th day of October, 1934, for the (23) purpose of defraying the cost of a hydro-electric power system of said County described in said Resolution.

Both principal of and interest on this bond are payable solely from a first lien on and pledge of a fixed amount of the gross revenues derived from the operation of the hydro-electric power system of said County as subsequently improved and extended which amount shall be sufficient at all times to pay the principal of and interest on the bonds when the same shall become due and payable. Neither this bond nor any of the interest coupons hereto attached constitute an indebtedness of said County of Greenwood within the meaning of any constitutional provision or statutory limitation.

Said County hereby agrees that it will continuously operate said hydro-electric power system and fix and maintain rates for the services furnished by said system as shall be sufficient at all times to provide for the payment of the interest on and principal of this bond and the issue of which it forms a part as and when the same becomes due and payable, to create a "Bond and Interest Redemption Fund" therefor, to provide for

the payment of the expenses of the administration and operation and such expenses for maintenance of said system as may be necessary to preserve the same in good repair and working order, to build up a reserve for depreciation of said system and to build up a reserve for improvements, betterments and extensions to said system other than those necessary to maintain the same in good repair and working order.

Under authority of said Act, as amended, and by the resolution authorizing the issuance of this bond, there has been created and granted to and in favor of the holder or holders of this bond and the issue of which it forms a part and to and in favor of the holder or holders of the coupons attached to said bonds a statutory lien, which is hereby recognized as valid and binding on said hydro-electric power system, with the appurtenances and extensions thereto, and said system shall remain subject to said statutory lien until the payment in full of the interest on and the principal of this bond and the issue of which it forms a part.

* * * * * * * * *

(24) The principal of and interest of this bond are exempt from any and all state, county and municipal and other taxation whatsoever under the laws of the State of South Carolina.

It is hereby certified and recited, that all conditions, acts and things required by the constitution or statutes of the State of South Carolina to exist, be performed, and happen precedent to or in the issuance of this bond exist, have been performed and have happened.

IN WITNESS WHEREOF, said County of Greenwood in the State of South Carolina, has caused this bond to be signed by its County Supervisor, and the County Treasurer and its corporate seal to be impressed thereon, and counter-signed and approved by the County Supervisor and the annexed coupons to be authenticated

by the facsimile signature of said ..... and this bond to be dated the first day of October, 1934.

.....
County Supervisor.

.....
County Treasurer.

Counter Signed and approved:

.....
County Supervisor.

* * * * * * *

Section 4. From and after the delivery of any bond issued under the provisions of this resolution, the system of the County of Greenwood shall be operated on a fiscal year basis, commencing on January 1st each year and ending on January 1st, of the following year, and on that basis the entire income and revenues of said system shall be set aside and deposited into separate and special funds as follows:

There shall be and there is hereby created a fund designated "County of Greenwood hydro-electric power (25) Bond and Interest Redemption Fund" of the County of Greenwood, South Carolina (hereinafter called the "Bond Fund"); there shall be paid into and there is hereby pledged to said Bond Fund from the gross revenues of the system as the same accrue, from month to month, such amount as will be necessary to pay the principal and interest requirements on the bonds on the next ensuing interest or bond maturity date, plus an additional margin of 10% of the principal and interest requirements for so long a time as is necessary to create a surplus equal to the principal and interest requirements on the bonds for the next succeeding 24 months. Provided, however, that no further payments shall be made into said Bond Fund when the amount held therein is equal to the total amount of interest and principal that will be payable at the maturity of all the outstanding bonds. If in any month the revenues derived from the operation of said system are insufficient to provide for

the payments into the Bond Fund herein required, then the amount of such deficiency shall be added to the amounts required to be so paid in the next succeeding month. The Bond Fund shall be continuously secured by a pledge of direct obligations of the United States Government having an aggregate market value, at all times, at least equal to the sum on deposit in said Bond Fund, or shall be invested in direct obligations of the United States Government.

Pursuant to Section 22 of said Act No. 299, as amended, there are hereby created Funds designated respectively "Operation and Maintenance Fund", "Depreciation Fun" and "Contingent Fund", and there are hereby pledged and ordered to be paid into the said Funds in each fiscal year from the remaining gross revenues and in the following order:

(a) INTO THE OPERATION AND MAINTENANCE FUND, a sum of not less than $40,000 to provide for the payment of all reasonable expenses of administration, operation, and such expenses for maintenance as may be reasonably necessary to preserve the system in good repair and working order;

(b) INTO THE DEPRECIATION FUND, a sum (26) of not less than $50,000 to build up a reasonable reserve for depreciation of said system; and

(c) INTO THE CONTINGENT FUND, a sum of not less than $10,000 to build up a reasonable reserve for improvements, betterments and extensions to said system, other than those expenses which are reasonably necessary to maintain the same in good repair and working order as hereinabove provided for.

Any revenues of the system remaining after the foregoing payments may be disposed of as the Finance Board of Greenwood County shall determine to be for the best interest of the County.

Nothing contained in this section of this resolution shall be deemed to prevent the transfer of any moneys contained in said "Operation and Maintenance Fund", or "Depreciation Fund" or "Contingent Fund", pur-

suant to and within the limitations prescribed by Sections 26, 27 and 28 of said Act Number 299, as amended.

Section 5. It is hereby determined that the rates for services furnished by said system shall, until otherwise fixed and revised pursuant to said Act Number 299, as amended, be as follows, to-wit:

SCHEDULE A

Greenwood County Municipal Power Plant

Wholesale Power Rates to Municipalities

Wholesale Rate:

Demand—Charge—$1.00 per K. W. per month.

Demand—Maximum integrated sixty (60) minute period.

(27) Energy Charge:

First—100,000 Kilowatt hours per month at 5. mills per K. W. H.
Next—200,000 Kilowatt hours per month at 4. mills per K. W. H.
Over—300,000. Kilowatt hours per month at 3. mills per K. W. H.

In no case shall the energy plus the demand charge aggregate less than 7.0 Mills per K. W. H. for current consumed.

Minimum Monthly Bill:

$1.00 per K. W. per month, and in no case shall the minimum bill be less than the charge for sixty (60%) per cent of the highest demand occurring during the previous consecutive twelve (12) month period.

Adjustments of Demand Charge:

(a) Demand charge may be adjusted if, and when, Power Plant deems necessary to correct for power fac-

tors lower than eighty-five (85%) per cent. Such adjustments will be made in such manner as to bring the demand charge to the equivalent of eighty-five (85%) per cent power factor.

SCHEDULE B

GREENWOOD COUNTY MUNICIPAL POWER RATES TO INDUSTRIES AVAILABLE

To industrial power users demands in excess of 10 K. W. Service at primary distribution voltage or secondary distribution voltage at discretion of PURCHASER.

Demand Charge.

$1.15 per K. W. per month.

Demand—Maximum integrated thirty (30) minute period.

(28) Energy Charge.

First 10,000 K. W. H. per month at					11.5	mills	per K. W. H.	
Next 25,000	"	"	"	"	6.9	"	"	"
Next 65,000	"	"	"	"	4.6	"	"	"
Next 400,000	"	"	"	"	3.45	"	"	"
Excess								
Over 500,000	"	"	"	"	2.875	"	"	"

In no case shall the energy charge plus the demand charge aggregate less than 6.5 mills per K. W. H. for current consumed.

Minimum Monthly Bill.

$1.15 per K. W. of Maimum demand, but in no case shall the maximum demand for billing purposes be taken at less than 60% of the Maximum monthly demand billed during the preceding twelve (12) consecutive months period.

SEASONAL LOADS

PURCHASER may in its discretion discontinue service on seasonal loads and establish a minimum payment for idle months sufficient to cover costs involved.

ADJUSTMENT OF DEMAND.

Demand charge may be adjusted if, and when, power plant deems necessary to correct for power factor lower than eighty-five (85%) per cent. Such adjustments will be made in such manner as to bring the demand charge to the equivalent of eighty-five (85%) per cent power factor.

(29) SCHEDULE C

RETAIL RATES TO RURAL CUSTOMERS

Available

To all rural customers:

First 50 kilowatt hours per month @ 3.50c per K.W.H.
Next 150 " " " " @ 2.30c " "

Excess

Over 200 " " " " @ 1.15c " "

Minimum Monthly Bill

5 Ampere Meter	$0.85
15 Ampere Meter	1.15
50 Ampere Meter	1.75

The foregoing rates whenever necessary shall be revised so as to meet the requirements of this resolution and said County hereby covenants and agrees at all times to maintain such rates for services furnished by the system as shall be sufficient to provide for the payment of the interest on and principal of all of said bonds, as and when the same become due and payable, and to create a Bond and Interest Redemption Fund therefor (including a cushion fund to assure the payment of said interest and principal) and to provide for the payment of the expenses of administration and op-

eration and such expenses for maintenance of the system as may be necessary to preserve the same in good repair and working order, and to build up a reserve for depreciation of the system, and to build up a reserve for improvements, betterments and extensions to the system other than those necessary to maintain the same in good repair and working order, as hereinabove provided.

(30) Section 6. Prior to the time when any revenues shall be derived from the system, there shall be designated as custodian of such revenues a bank or trust company duly qualified and doing business within the State of South Carolina, and thereafter all funds derived from the operation of said system, as they are received, and all other funds required to be deposited with said custodian by Section 24 of said Act No. 299 of South Carolina Acts, 1933, shall be deposited with said bank or trust company, as provided in said Act, and there shall be filed with such custodian written instructions complying with said Section 24 of said Act and with Section 4 of this resolution.

Section 7. In the event the County of Greenwood or any department, agency, or instrumentality thereof, shall avail itself of any facilities or services rendered by the system, the reasonable value of the facilities or services of said system shall be collected from said County department, agency or instrumentality monthly as the same accrues. The revenues so received shall be deemed to be revenues derived from the operation of the system and shall be deposited and accounted for in the same manner as other revenues of the system.

Section 8. All moneys received from the sale of any bonds issued pursuant hereto, exclusive of accrued interest, shall be applied solely for the construction of the project as hereir authorized, provided that such proceeds, together with all moneys received as accrued interest, shall be used also to pay the interest on said bonds until the completion of construction.

Section 9. It is covenanted and agreed by the County of Greenwood with the holder, or holders, of the bonds herein authorized to be issued that it will perform all

duties with reference to the system required by the constitution and the statutes of South Carolina, and said County hereby irrevocably covenants, binds and obligates itself not to sell, lease or dispose of said system, including any extensions or additions that may be made thereto, until all the bonds issued hereunder shall be paid in full, both principal and interest, or unless and until provisions shall have been made for the payment of (31) said bonds and the interest thereon in full, and the County further covenants and agrees with the holder or holders, of said bonds to maintain in good condition and to operate said system and to charge and collect such rates and charges for the services rendered by said system, within the limits prescribed by law, so that the income and revenues of the system will be sufficient at all times to meet the requirements as set out in Section 4 hereof.

Section 10. For the further protection of the holders of the bonds herein authorized to be issued and the coupons thereto attached, a statutory lien upon said system is hereby granted and created as provided in Section 8 of said Act No. 299, as amended, which statutory lien is hereby recognized as valid and binding upon the County of Greenwood, and said system, and shall take effect immediately upon the delivery of any bond authorized to be issued under the provisions of this resolution, and any holder of said bonds or any of the coupons may, either in law or in equity, by suit, action, mandamus or other proceedings, protect the statutory mortgage lien hereby conferred, and may by suit, action, mandamus or other proceeding, enforce and compel the performance of all duties required by said act as amended, including the making and collecting of sufficient rates, segregating of the income and revenues and the application thereof.

If there be any default in the payment of principal or interest of any of said bonds, then, upon the institution of suit by any holder of said bonds or of any of the coupons, any court having jurisdiction of the action may appoint a receiver to administer said system on behalf of said County, with the power to charge and collect rates sufficient to provide for the payment of the bonds or obligations outstanding against said system, and for

the payment of the operating expenses and to apply the income and revenues in conformity with this resolution.

Section 11. While any of the bonds herein authorized remain outstanding, the County of Greenwood shall not issue any additional bonds payable from the (32) revenues of said system, unless the lien of such bonds on the revenues of said system is made junior and subordinate in all respects to the lien of the bonds herein authorized.

Section 12. So long as any of said bonds are outstanding the County of Greenwood shall:

(a) Maintain insurance for the benefit of the holders of the bonds herein authorized of a kind and in an amount which usually would be carried by private companies engaged in a similar type of business, and to pay the cost of such insurance from the Operation and Maintenance Fund hereinbefore described.

(b) Keep proper books of records and accounts (separate from all other records and accounts) in which complete and correct entries shall be made of all transactions relating to said system. The County will furnish the original purchaser or purchasers of said bonds and to any holder or holders of any of the said bond, at the written request of such holder or holders, not more than thirty days after the close of each six months' fiscal period, complete operating and income statements of the said system in reasonable detail covering such six months' period, and not more than sixty days after the close of each fiscal year, complete financial statements of the said system in reasonable detail covering such fiscal year certified by independent auditors; and

(c) Grant to any holder or holders of 25 per cent of outstanding bonds or to any purchaser from the original purchaser of the bonds herein authorized, the right at all reasonable times to inspect the said system and all records, accounts and data of the County relating thereto.

Section 13. The officers of said County of Greenwood required by this resolution to execute said bonds are

hereby authorized and directed to execute said bonds, and the said County is authorized and directed to deliver said bonds to the purchaser or purchasers to whom they may be sold from time to time, pursuant to the provisions of said Act No. 299 and Act 1095 as amended, (33) upon receiving the purchase price to be paid by said purchaser or purchasers, and to deposit said purchase price in a special account in a bank to be designated by this body. Said deposit shall be secured in the manner provided by Section 15 of said Act No. 299, as amended.

Section 14. If any section, paragraph, clause or provision of this ordinance shall be held invalid, the invalidity of such section, paragraph, clause or provisions shall not affect any of the remaining provisions of this resolution.

Section 15. All ordinances, resolutions and orders or parts thereof in conflict with the provisions of this resolution are to the extent of such conflict, hereby repealed.

Section 16. This resolution shall take effect immediately upon its passage.

EXHIBIT II.

EXTRACT FROM APPLICATION OF GREENWOOD COUNTY TO THE FEDERAL POWER COMMISSION, FILED SEPTEMBER 13, 1934, FOR A LICENSE FOR SAID BUZZARD ROOST PROJECT.

"A main transmission line of 44,000 volts will be built forming a loop and passing through the County seats of three Counties, namely, Greenwood, Newbury and Laurens. The Counties bear the same names as the County seats. In addition to the County seats the main transmission line will pass through numerous other towns shown on exhibits. Electricity will be supplied to all towns and small industries along the main transmission line, and contracts have been executed with all except Clinton, and this town is expected to sign a contract soon. * * * The proposed use or market for the power to be developed is as follows: Greenwood County holds

contracts with the following consumers for primary power:

(34)

Consumer	Estimated Yearly Consumption K.W.Hrs.	Average Rate	Amount
City of Greenwood	6,000,000	0.0075	$45,000.00
Grenco Oil Mill	750,000	0.01	7,500.00
Town of Ninety-Six	750,000	0.01	7,500.00
City of Newbury	3,000,000	0.0075	22,500.00
Farmers Oil Mill & Ice Plant	1,000,000	0.01	10,000.00
City of Laurens	2,000,000	0.008	16,000.00
Laurens Glass Works	1,200,000	0.009	10,800.00
Rural electrification	500,000	0.02	10,000.00

The following contract is for secondary power:

Grendel Cotton Mills	3,000,000	0.005	15,000.00
		Total,	*$160,300.00

The following is a list of prospective customers in the area:

Consumer	Location	Estimated Consumption K.W.Hrs.
City of Clinton, S. C.		1,200,000
Cotton Mills	at Clinton	17,000,000(secondary)
Cotton Mills	at Goldville	15,000,000
Cotton Mills	at Newbury	20,000,000
City of prosperity		500,000
Cotton Mills	at Greenwood	17,000,000
Cotton Mills	at Ninety-Six	9,000,000(secondary)
City of Abbeville		1,200,000
Cotton Mill	at Abbeville	3,000,000(secondary)
City of Edgefield		1,200,000
Cotton Mill	at Edgefield	3,000,000(secondary)
Cotton Mills	at Laurens	15,000,000
Rural Electric Customers		1,000,000
	Total	104,100,000 K.W.Hrs.

The customers with whom we have contracts will consume aproximately 20 million K.W.Hrs. yearly.

(35) The prospective customers in the area consume 104 million K.W.Hrs. yearly."

*This total is an incorrect addition of the several amounts shown, the correct total being $144,300.00 instead of $160,300.00, as set forth in the application.

STATEMENT AS TO EXHIBIT III

Exhibit III, attached to the Original Bill of Complaint, is a copy of the Opinion of The Supreme Court of the State of South Carolina in the case of Dr. R. H. Park, in his own right as a citizen and taxpayer of the County of Greenwood, and on behalf of other persons similarly situated, vs. Greenwood County, et al.—176 S. E. Rep., 870; 174 S. C. 35.

EXHIBIT IV.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION.

Dr. R. H. Parke, in his own right as a Citizen and Taxpayer of the County of Greenwood, and in behalf of other persons similarly situated, Plaintiff,

against

Greenwood County, and E. L. Brooks, County Supervisor and member of The Finance Board for Greenwood County, S. A. Agnew, Treasurer of Greenwood County and member of The Finance Board for Greenwood County and E. I. Davis, member of The Finance Board of Greenwood County, Defendants.

(36). COMPLAINT

The Complaint of the above named Plaintiff respectfully shows unto the Court and alleges:

1. That the Plaintiff is a resident of the County of Greenwood, State of South Carolina, and is the owner of real estate therein and is a taxpayer to said County, and that he brings this action in his own behalf and in behalf of all other citizens and taxpayers of the County of Greenwood who are similarly situated and who come in and contribute to the costs and expenses of this action.

2. That the defendant, Greenwood County, is a political subdivision of the State of South Carolina duly created by an Act of the General Assembly of the State of South Carolina, approved the second day of March, 1897.

3. That the defendant, E. L. Brooks, is the duly appointed and qualified supervisor of the County of Greenwood and a member of the Finance Board for Greenwood County; and that the defendant, S. A. Agnew, is the duly appointed and qualfied Treasurer of Greenwood County and a member of the Finance Board for Greenwood County, and that the defendant, E. I. Davis, is the duly appointed and qualified member of the Finance Board for Greenwood County.

4. That the General Assembly of the State of South Carolina, during its regular session of 1931, passed an Act approved the 23rd day of March, 1931 creating the Finance Board for Greenwood County and conferred on said Board power to handle the fiscal and financial affairs of the County of Greenwood, and that The Finance Board of Greenwood County is now the general governing body of the County of Greenwood.

5. That the General Assembly of the State of South Carolina, during its regular session of 1933, passed an Act approved the 8th day of May, 1933 which said Act,

among other things, authorized and empowered any County and other municipalities and political subdivi-
(37) sions therein named, to purchase or construct waterworks, sewerage systems, lighting plants, power plants and distribution system and other projects and facilities named in the Act, are authorized to issue revenue bonds or certificates, the same to be secured by the works or project so authorized, the principal and interest on said revenue bonds or certificates to be paid solely from the revenue derived from the works or projects constructed and in no event shall said bonds or revenue certificates, or any part of the principal or interest thereon, be paid by taxation or any taxpayer, the works or projects and revenue therefrom to be solely liable for the payment of said bonds.

6. That the General Assembly of the State of South Carolina, at its regular session of 1934, passed an Act approved the 12th day of April, 1934, which said Act, among other things, authorized and empowered The Finance Board for Greenwood County to contract with the Public Works Administration, or any other agency or instrumentality of the Government of the United States to borrow funds sufficient for the construction of a hydro-electric plant, the said loan to be secured by revenue bonds or certificates, a copy of said Act is hereto attached and made a part of this complaint.

7. That pursuant to and under the authority of the Acts of the General Assembly of the State of South Carolina, hereinabove referred to, the defendant Greenwood County, by its duly constituted governing Board, The Finance Board for Greenwood County, has entered into negotiations with the Public Works Administration, an agency or instrumentality of the Government of the United States, duly created by Congress of the United States, which said negotiations have resulted in an approval of a loan to the County of Greenwood in the sum of Two Million, Seven Hundred, Sixty-Seven Thousand $2,767,000.00) Dollars, the proceeds of said loan to be used in the building of a hydro-electric plant or project, with accessories, on the Saluda River in the State of South Carolina, at a point on said River known as "Buz-

zard Roost'' together with electric transmission lines in and through Greenwood County and other adjoining counties, and that pursuant to the terms of the approval
(38) and agreement hereinabove referred to, the County of Greenwood is to issue its revenue bonds or certificates in the amount of the loan approved, to-wit, Two Million, Seven Hundred, Sixty-Seven Thousand ($2,767,000.00) Dollars, the principal and interest of said bonds to be secured by revenue from the project and the project itself.

8. That the defendant, County of Greenwood, has already spent and utilized the approximate sum of Fifteen Hundred ($1,500.00) Dollars of money paid to the County of Greenwood by the taxpayers thereof in the furtherance of the project hereinabove named and in the consummation of the agreement heretofore made with the Public Works Administration of the United States, and is now spending and contemplates further spending of said taxpayers funds in the furtherance of the said hydro-electric project.

9. That the plaintiff is informed and believes and alleges that the use and expenditure by the defendants of the monies paid to the defendant by the taxpayers of Greenwood County for any of the purposes hereinabove named and alleged is illegal, ultra vires and in violation of Article VIII, Section 5 of the Constitution of the State of South Carolina, and is also in violation of Article X, Section 6 of the Constitution of the State of South Carolina.

10. That by reason of the foregoing named unlawful and unconstitutional acts of the defendants, the plaintiff as a taxpayer of Greenwood County, and all other persons similarly situated, are suffering and will continue to suffer irreparable damage for which they have no adequate remedy at law, and that the plaintiff is entitled to an Order of this Court restraining and enjoining the County of Greenwood by, or through its governing body, The Finance Board for Greenwood County, from any further commission of the unlawful acts hereinabove alleged.

WHEREFORE, plaintiff prays.

First, That this Court issue its Rule to Show Cause (39) directed to the defendants requiring them to Show Cause before this Court, if any they can, why they should not be restrained and enjoined from the further use or expenditure of monies or credits of the County of Greenwood for the purpose of securing a loan from the Public Works Administration of the United States, or any agency or instrumentality thereof, and that the defendants be restrained and enjoined from the construction and operation of a hydro-electric project, together with accessories and electric power transmission line.

Second, For such other and further relief as to the Court seems just and equitable.

D. A. G. OUZTS,
Attorney for Plaintiff.

State of South Carolina,
County of Greenwood.

PERSONALLY appeared before me Dr. R. H. Park, who being first duly sworn, says: That he has read the foregoing complaint and that each of the allegations therein contained are true of his own knowledge, except those allegations made on information and belief, and that as to those he believes the same to be true.

DR. R. H. PARK.

SWORN to and subscribed before me this the 25 day of September, 1934.

D. A. G. OUZTS, (L. S.)
Notary Public for S. C.

NO. 902

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO AUTHORIZE ANY COUNTY, TOWNSHIP, CITY OR INCORPORATED TOWN OF THE STATE OF SOUTH CAROLINA TO PURCHASE OR CONSTRUCT A WATERWORKS SYSTEM, ETC.", APPROVED MAY 8, 1933, SO AS TO PROVIDE THE (40) RIGHT TO CONDEMN PROPERTY NECESSARY OR CONVENIENT FOR ANY OF THE PURPOSES MENTIONED IN THE SAID ACT; TO FURTHER DEFINE THE TERM BORROWER; AND TO CONFORM THE PROVISIONS OF THE ACT TO THE PUBLIC WORKS ADMINISTRATION REQUIREMENTS.

SECTION 1: Act 299, 1933 Acts, Amended * * Condemn Necessary property "Borrower" Further Defined —Conform provisions to PWA Requirements. Be it enacted by the General Assembly of the State of South Carolina: That an Act entitled "An Act to Authorize any County, Township, City or Incorporated Town of the State of South Carolina to Purchase or construct a Water Works system, etc.," approved May 8, 1933, and designated as Act No. 299 of the Acts of the General Assembly for the year 1933 be, and the same is hereby amended as follows:

(A-1) Add at the end of Section 1 the following Section to be designated as follows:

SECTION 1-A: This Act shall be construed as cumulative authority for the purposes named in Section 1 hereof, and as to the manner and form of issuing revenue bonds for any such purpose or purposes, and shall not be construed to repeal any existing laws with respect thereto, it being the purpose and intention of this Act to create an additional and alternate method for the purposes herein named.

SECTION 1-B: Every municipality in the State of South Carolina is hereby authorized and empowered to construct, acquire, own, equip, operate, maintain and/or enlarge, extend, or increase any of the works described in Section 1, together with all appurtenances necessary, useful or convenient for the maintenance and operation of such works, and shall have authority to acquire by gift, grant, purchase, condemnation or otherwise all necessary lands, rights-of-way and property therefor within and/or without the corporate limits of such municipality in the county in which it is situate and/or in any adjoining county or counties, and where the condemning municipality is a county the right to (41) condemn shall extend to property within such county and to property in adjoining counties, and to issue revenue certificates to pay the cost of such works and property. No obligation shall be incurred by the municipality in such construction, acquisition, extension or improvement except such as is payable solely from the funds provided under the authority of this Act.

SECTION 1-C: Every such municipality shall have power to condemn any such works to be acquired and any land, rights, easements, franchises and other property, real or personal deemed necessary or convenient for the construction of any such works, for extension, improvements, or additions thereto, and right of condemnation of any such property deemed necessary or convenient shall extend to any such property in the county in which the municipality is situate and/or any adjoining county or counties, and where the condemning municipality is a county the right to condemn shall extend to property within such county and to property in adjoining counties, and in connection therewith, shall have and may exercise all the rights, powers, and privileges, or eminent domain granted to municipalities under the laws relating thereto. Title to property shall be taken in the name of the municipality. Proceedings for such appropriation of property shall be under and pursuant to the general proceedings of law relating to condemnation proceedings in the exercise of the right of eminent domain: PROVIDED, The municipality shall be under no obligation to accept and pay for any property condemned and shall in no event pay for any property condemned or purchased, except from the funds provided

pursuant to this Act; and in any proceedings to condemn, such orders may be made as may be just to the municipality and to the owners of the property to be condemned; and an undertaking or other security may be required securing such owners against any loss or damage which may be sustained by reason of the failure of the municipality to accept and pay for the property, but such undertaking or security shall impose no liability upon the municipality except such as may be paid from the funds provided under the authority of this Act. In the event of the acquisition by purchase the Board may obtain and exercise an option from the own-
(42) . ers of said property for the purchase thereof, and may enter into a contract for the purchase thereof, and such purchase may be made upon such terms and conditions and in such manner as the Board may deem proper: PROVIDED, HOWEVER, That such exercise of option, purchase or contract for such purchase shall in no event bind or obligate such municipality or create any debt, liability or claim except such as may be paid from the funds provided under the authority of this Act. In event of the acquisition of any works already constructed by purchase or condemnation, the Board at or before the time of the adoption of the ordinances or resolution described in Section 6 thereof, shall cause to be determined what repairs, replacements, additions and betterments will be necessary in order that such works may be effective for their purposes, and an estimate of the cost of such improvements shall be included in the estimate of the cost required by Section 6 hereof, and such improvements shall be made upon the acquisition of the works and as a part of the cost thereof.

SECTION 1-D. All sections, provisions, and clauses of this Act, and all prior Acts, which are repugnant to or inconsistent with the provisions of the Public Works Administration Act of the Congress of The United States, are hereby declared void only insofar as the same are in conflict with the Public Works Administration Act, the intention of this Act being to enable the municipality, county, township, city or incorporated town or borrower to qualify for the securing of the loan available from the Public Works Administration of the Federal Gov-

ernment and any other right, privilege or immunity granted by any Act of the Congress of the United States or any Board, Commission, Agency or Instrumentality thereof.

Approved the 12th day of April, 1934.

ACKNOWLEDGMENT OF SERVICE

We the undersigned, constituting the entire membership of The Finance Board for Greenwood County, do each acknowledge due and legal service of copies of the (43) original complaint and Rule to Show Cause in the above entitled action.

WITNESS our hands and seals this 26th day of September, 1934.

E. L. BROOKS (L. S.)
S. A. AGNEW (L. S.)
E. I. DAVIS (L. S.)

In the presence of:

D. A. G. OUZTS
R. F. DAVIS

EXHIBIT V.

RETURN AND ANSWER

The defendants by way of answer to the complainant and Return to the Rule to Show Cause in the above entitled cause, respectfully shows unto the Court and alleges:

1. That they admit the allegations of fact contained in Paragraphs 1, 2, 3, 4, 5, 6 and 8 and so much of Paragraph 7 as alleges therein that the defendants have negotiated and secured the approval of a loan from the

Public Works Administration, an agency or instrumentality of the Government of the United States, for the purposes named in said paragraph, and in reference thereto allege, that under the terms and provisions of the Act of Congress authorizing and permitting the said loan that thirty (30%) per cent of the same is a direct gift to the municipality securing said loan and only seventy (70%) percent of the amount named in said paragraph constitutes a loan, and that the defendants deny the allegations of Paragraphs 9 and 10 of the Complaint.

2. Further answering, the defendants allege that pursuant to the powers conferred by the Acts of the General Assembly of the State of South Carolina, named in the Complaint, and the Acts of the Congress of the United (44) States, they have entered into negotiations with the Public Works Administration, an agency or instrumentality of the Government of the United States, for the granting of a loan to the defendants, County of Greenwood, in the sum of Two Million, Seven Hundred, Sixty-Seven ($2,767,000.00) Dollars, proceeds of said loan to be used exclusively for the construction of a hydro-electric plant, together with accessories and distribution lines, said plant to be located on the Saluda River, State of South Carolina, as alleged in the Complaint, and the said negotiations have resulted in the approval of a loan by the said Public Works Administration in the amount hereinabove alleged, to-wit, Two Million, Seven Hundred, Sixty-Seven ($2,767,000.00) Dollars.

3. That under and pursuant to the Acts of the General Assembly of the State of South Carolina authorizing the defendants to secure a loan from the Public Works Administration of the Government of the United States, for the purposes named in the various Acts referred to in the Complaint and other Acts of the General Assembly of the State of South Carolina, and the Act of the Congress of the United States authorizing said loan, or loans, it is expressly stipulated that counties and other political subdivisions named in the Acts may acquire, construct, extend or enlarge the works or projects named in the Acts and finance the same by the issue of revenue bonds or certificates as the sole and only security for such loan or loans.

4. That the Acts of the General Assembly of the State of South Carolina authorizing the defendants to secure the loan hereinabove referred to, and the Acts of the Congress of the United States in reference thereto, expressly provide that the bonds to be issued by the defendants in financing the work or project named in the Complaint shall be revenue bonds or certificates, the principal and interest of which, or any part thereof, are to be secured solely by the revenue derived from the project and the physical properties of the project itself, and that in no event shall the taxpapers of the County or other subdivisions named in the Act be called upon to pay said bonds, or interest, or any part thereof, and said Act further provides that bonds issued thereunder (45) shall not constitute an indebtedness of such borrower within any State constitutional provisions or statutory limitations.

5. That as a prerequisite to the securing of the loan by the defendants to finance the hydro-electric plant referred to in the Complaint, it was necessary and mandatory to make extensive preliminary surveys and borings and to perform numerous other engineering functions necessary and incident to the determination of the engineering practicability of the project and that the defendants have expended approximately Fifteen Hundred ($1500.00) Dollars for the purposes hereinabove named, however, under the terms and conditions of the Act and Acts authorizing the loan for the aforesaid project, these preliminary expenditures and all other preliminary costs and expenses are refunded to the County of Greenwood, and these defendants deny that plaintiff is sustaining any injury or damage whatsoever by reason of the small expenditures hereinabove stated, preliminary to the granting of said loan in the absence of said expenditures for the purposes herein named, the loan could not be secured.

6. Further answering, the defendants deny the Acts of the General Assembly of the State of South Carolina authorizing the construction and operation by the defendants of the project complained of by the plaintiff, and financed as provided for by said Act is in violation

of Section 5, Articles VIII of the Constitution of the State of South Carolina, in that the revenue bonds or certificates proposed to be issued by the defendants can in no event become the obligations of the County of Greenwood.

7. That the purpose and intention of the construction and operation of the aforementioned hydro-electric plant by the defendants is to generate and to distribute electric current, primarily, direct to municipalities and industries and to promote and encourage rural electrification and to make practicable, by reason of cost to be charged for current, and the extension of transmission lines where the same can be available to small urban and rural communities comprising the greater portion of the (46) population of the Counties of Greenwood, Newbury and Laurens, and that the defendants allege that the use and accessibility to electric power is a modern day necessity affecting the health, morals, happiness and welfare of the citizens and residents of the counties and communities proposed to be served by the erection and operation of the project hereinabove named, and that the same is a proper and legal exercise of the governmental functions of the County of Greenwood and is not a violation of Section 6, Article X of the Constitution of the State of South Carolina, prohibiting the credit of the State, or any political subdivision thereof, to be pledged alone for the benefit of any individual, company, association or corporation.

WHEREFORE, defendants pray that the Rule to Show Cause heretofore issued by this Court be dissolved with costs.

R. F. DAVIS
W. H. NICHOLSON
Attorneys for Defendants.

State of South Carolina,
County of Greenwood.

PERSONALLY appeared before me E. L. Brooks, who being first duly sworn, says: That he is the County

Supervisor for the County of Greenwood and a member of The Finance Board for Greenwood County; that he has read the foregoing Return and Answer and that each of the allegations therein contained are true of his own knowledge, except those allegations made on information and belief, and that as to those he believes the same to be true.

E. L. BROOKS.

SWORN to and subscribed before me this the 26th day of September, 1934.

E. I. DAVIS,
Notary Public for S. C. (L. S.)

(47) ACKNOWLEDGMENT OF SERVICE

Due and legal service of a copy of the answer and Rule to Show Cause in the above entitled action is hereby acknowledged.

Witness my hand and seal this 26th day of September, 1934.

D. A. G. OUZTS,
Attorney for Plaintiff.

EX. VI.

PETITION TO INTERPLEAD

Ex Parte.

Duke Power Company and Southern Public Utilities Company,

In re,

Dr. R. H. Park, in his own right as a Citizen and Taxpayer of the

County of Greenwood, and in behalf of other persons similarly situated, Plaintiff,

vs.

Greenwood County, et al.

To the Honorable, the Supreme Court of South Carolina:

Your petitioners, Duke Power Company and southern Public Utilities Company, by this their petition to interplead in the above entitled action, would respectfully show to the Court:

I.

Duke Power Company is a corporation organized (48) and existing under the laws of the State of New Jersey. It is duly domesticated under the laws of the State of South Carolina, and is duly authorized and licensed to carry on and conduct its business in this State.

II.

Southern Public Utilities is a corporation duly organized and existing under the laws of the State of Maine. It is duly domesticated under the laws of the State of South Carolina, and is duly authorized and licensed to carry on and conduct its business in said State.

III.

On the 26th day of September, 1934, Dr. R. H. Park, as a citizen and taxpayer of Greenwood County on behalf of himself and others similarly situated, commenced within the original jurisdiction of this Court, sitting as a Court of Equity, the above entitled suit for injunctive relief against Greenwood County and the other defendants named as the duly constituted agents and officials of said County. The complaint alleges, in substance, that under and pursuant to authority conferred by certain statutes of the State of South Carolina mentioned in the complaint the defendants had entered into

negotiations with the Public Works Administration, an Agency or instrumentality of the Government of the United States, which said negotiations had resulted in an approval of a loan to the County of Greenwood in the sum of $2,767,000, the proceeds of which were to be used in the building of the hidro electric plant or project with accessories on the Saluda River in the State of South Carolina, at a point known as "Buzzard Roost", together with electric transmission lines in and through Greenwood County and other adjoining Counties, and the pursuant to the terms of such approval and agreement, the County of Greenwood is to issue its revenue bonds in the amount of $2,767,000, to be secured by revenue from the project and by the project itself; that the defendant, Greenwood County, had already spent about the sum of $1,500 of the general funds of Greenwood County in furtherance and promotion of the said project, and contemplates the further expenditure of such funds of said County in furtherance of said hydro electric (49) project; and that, as plaintiff is informed and believes, the use by the defendants of the moneys paid to the County by the taxpayer thereof for any such purposes, is illegal and *ultra vires* and in violation of Article VIII, Section 5, and of Article X, Section 6 of the Constitution of the State of South Carolina.

IV.

On the same day to-wit, the 26th day of September, 1934, the defendants served upon the plaintiff and filed in this Court their return and answer admitting, in substance, the allegations of fact set up in the Complaint, except in so far as it is alleged that all of the amount proposed to be secured from the Public Works Administration would be a loan, in that 30% thereof would be a direct gift to the municipality, and further setting up the authority of certain statutes of the State and of the United States, as alleged in said Answer and Return, and expressly denying that the use and expenditure by the defendants of the moneys paid to the defendant Greenwood County by the taxpayers of Greenwood County for any of the purposes named and alleged, is in contravention of Article VIII, Section 5 and further

denying that the Acts of the General Assembly of South Carolina authorizing the construction and operation by the defendants of the hydro electric project complained of is in violation of Section 5, Article VIII, or of Section 6, Article X, of the Constitution of the State of South Carolina.

V.

The issue or issues of fact and of law so joined by the pleadings in said suit raise the question of the legal validity, in so far as plaintiff's rights as a taxpayer of Greenwood County are involved, of the acts and proposed acts of the defendants set forth in the pleadings under the statutes and constitutional provisions referred to and invoked in the said pleadings.

VI.

In the determination by this Honorable Court of the issues of fact and law thus raised by said pleadings your (50) petitioners are directly interested in the same way and, as they are informed and believe, to a much greater extent, as taxpayers and property owners of Greenwood County, than the plaintiff in the pending suit.

Each of your petitioners owns real and personal property located in Greenwood County, and is a large taxpayer of Greenwood County, and as such directly interested in its fiscal affairs and their administration as a political and taxing subdivision of the State, and each is entitled to all privileges and immunities of citizenship with respect to the protection of its property rights in that regard.

VII.

Your petitioners are further directly interested in the determination of the controversy presented, or sought to be presented, in said suit in that they possess and are now exercising property rights other than those apper-

taining to them as above stated, which rights have been and will be seriously affected and injured by a prosecution and the carrying out of the construction and operation of the said hydro electric project upon which the defendants propose to enter and engage, in that your petitioners are public electric utility corporations and electric lighting and power companies, duly authorized and empowered to carry on the business of generating and supplying electric energy for lighting and power purposes to the public in the State of South Carolina, including Greenwood County and adjoining Counties and various of the cities and towns in said Counties, under valuable franchises granted for that purpose, with which business the construction and operation of the said Greenwood County electrical project will directly and injuriously conflict and compete.

VIII.

Southern Public Utilities Company is the wholly owned subsidiary of Duke Power Company, and together they constitute what is known as Duke Power System. The facilities of said system consist of hydro electric plants supplemented with storage reservoirs and steam station capacity, and of transmission and distribution (51) lines and other equipment which are fully able to serve the public of the territory proposed to be served by the Greenwood County project. The System as it exists today has been built up and *expenaded* over a number of years, starting with a small hydroelectric development upon the Catawba River near Rock Hill, which was placed in operation in 1904. In the building up of this System it has expended many millions of dollars, has given employment to many thousands of the people of this State, has paid tremendous amounts in taxes to the school districts, the towns and cities, the counties, and to the State, and has initiated and fostered numerous manufacturing and industrial enterprises which are now contributing large sums in taxes to the State and its taxing subdivisions and furnishing employment to many thousands of people. The rates and the terms upon which it serves the public are under the control of the Railroad Commission of South Carolina, and both of

your petitioners have duly complied with all the rules and regulations of the said regulatory authority. It is this business of petitioners, thus built and equipped and operated, which defendants, in furtherance of this proposed project, are seeking to take from petitioners, which undertaking, if successful, will result in the taking away from petitioners of a large part, if not the whole, of their business in Greenwood County and certain of the adjoining Counties, by means which, as petitioners are advised and believe, are unlawful.

IX.

Your petitioners are further advised and believe that neither the Complaint nor the Return and Answer in the said suit raise or present all the issues of fact or of law upon which the sound and just judicial determination of the validity of the acts and proceedings of the defendants with respect to said power project depend, in that relevant facts have not been stated and applicable provisions of the State and Federal Statute Law, as well as applicable provisions of the State and Federal Constitutions, have not been invoked, either expressly or impliedly.

X.

The matters of fact and the questions of law which (52) petitioners desire to present and raise are, as petitioners are advised and believe, not only pertinent to the just determination of the said controversy but are essential thereto both from the standpoint of the plaintiff in said suit and of your petitioners as such taxpayers and property owners of Greenwood County and from that of your petitioners as public service companies, engaged in the business of generating and supplying electric energy to the public for lighting and power purposes in the County of Greenwood and adjoining Counties and throughout the Piedmont Section of this State under franchises granted for that purpose.

XI.

To the end that your petitioners may plead such additional facts and raise such additional questions of law your petitioners aver that they are necessary parties, or, if not necessary parties, that they are, in any view, proper parties, to said suit and are entitled to interplead therein by serving and filing their separate Complaint within such reasonable time as the Court may fix.

WHEREFORE, your petitioners pray:

(1) For an Order requiring the parties to the said suit to show cause before this Court on October 8th, at 10:00 A. M. why these petitioners should not be allowed to intervene and plead in said suit.

(2) For an Order permitting petitioners to serve and file their Complaint in the said suit within such reasonable time as may be fixed by the Court.

(3) For such other and further relief as may be just and proper.

(sd) H. J. HAYNSWORTH,
W. R. PERKINS,
W. S. O'B. ROBINSON, JR.,
J. H. MARION,
Attorneys for Petitioners.

(Duly verified)

(53)

EX. VII.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION.

Ex Parte:

Duke Power Company and Southern Public Utilities Company, Petitioners,

In re:

Dr. R. H. Park, in his own right as a Citizen and Taxpayer of the County of Greenwood, and in behalf of other persons similarly situated, Plaintiff,

vs.

Greenwood County, et al, Defendants.

RETURN.

The plaintiff, Dr. R. H. Park, in the above entitled action by way of Return to the Rule to Show Cause heretofore secured by the above named Petitioners respectfully shows:

1. That the Plaintiff is solely interested in the Court determining the constitutional question presented by the original pleadings in this action, which action was brought for the purpose of restraining and enjoining the County of Greenwood through and by its governing body, The Finance Board of Greenwood County, from a further expenditure of county taxpayer's funds in aid and in behalf of the construction of the project named in the complaint.

2. That the plaintiff has no objection to the petitioners, Duke Power Company and Southern Public Utilties Company, intervening in this action, provided their intervention is for the sole purpose of securing an adjudication of the issues raised by the pleadings in this action, and that the plaintiff is opposed to the interven-

(54) tion in this case by the petitioners, Duke Power Company and Southern Public Utilities Company, if it is their intention to inject any issues outside of those raised by the pleadings in this action.

3. The plaintiff is informed and believes that the above named Petitioners seek an intervention in this action for the purpose of having the Court to refer certain issues which are in no wise germane to the determination of the issues raised by the plaintiff, and that to permit the Petitioners to intervene for the purposes stated in their petition would delay indefinitely the determination by this Court of the issues presented by the plaintiff and permit the County of Greenwood to continue for an indefinite time the expenditure of taxpayer's funds in furtherance of the illegal project.

D. A. G. OUTZ,
Attorney for Plaintiff.

(Duly verified)

EX. VIII.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION.

Ex Parte:

Duke Power Company and Southern Public Utilities Company, Petitioners,

In re: RETURN.

Dr. R. H. Park, in his own right as a Citizen and Taxpayer of the County of Greenwood, and in behalf of other Persons Similarly Situated, Plaintiff,

vs.

Greenwood County, et al, Defendants.

(55) The defendants by way of return to the petition to interplead, would respectfully show to this Court:

1. They admit, on information and belief, the allegations of paragraphs 1, 2, 5 and so much of paragraph 3 as alleges the institution of an action in the original jurisdiction of this Court by Dr. R. H. Park on or about the 26th day of September, 1934, but crave reference to the complaint in that action as to its allegations.

2. In answer to the allegations of paragraph 4, these defendants admit that they have filed their return and answer, but crave reference to the return and answer as to the facts therein set out.

3. In answer to the allegations of paragraph 6, these defendants aver that the interest of the intervenors as taxpayers is the same as the interest of the plaintiff, R. H. Park, and admit they are taxpayers of Greenwood County.

4. In answer to the allegations of paragraph 7, these defendants admit, on information and belief, that the intervenors are public electrical utilities corporations operating in the State of South Carolina, and in Greenwood County, but aver, on information, advice and belief, that as prospective competitors of the defendant's Buzzard Roost Project, they have no legal right to participate in this proceeding.

5. In answer to the allegations of paragraph 8, these defendants aver that the allegations thereof are not germane to the issues before the Court; do not constitute reasons for permitting the intervention of the petitioners, or for the granting of injunctive relief against these defendants.

6. In answer to the allegations of paragraph 9, on information, advice and belief, these defendants aver that all proper issues of law and of fact have been raised in the complaint and return heretofore filed in this action.

7. In answer to the allegations of paragraph 10, these defendants reiterate, on information, advice and belief, that all pertinent questions of law and of fact have

(56) been raised by the complaint and the return herein already filed, and that no further questions are suggested in the petition for intervention.

8. In answer to the allegations of paragraph 11 these defendants deny that the proposed intervenors are either necessary or proper parties.

FOR A FURTHER ANSWER AND DEFENSE THESE RESPONDENTS AVER:

9. That for a period of more than twelve months, for the purpose of supplying a strong and increasing demand in the Greenwood section, for power for industrial enterprise and rural electrification, at reasonable cost to the users, they have been working on the development of a hydro electrical plant at Buzzard Roost, to the knowledge of the Duke Power Company and the Southern Public Utilities, both of which corporations have actively, for a period of approximately twelve months, opposed every stage of the development of the Greenwood County Project before the Public Works Administration, the Federal Power Commission and other agencies and instrumentalities. On information, advice and belief, that the proposed intervenors have intended to fight this Project and have fought it at every stage, and have had ample time and opportunity to have asked the intervention of this Court long prior to this time, but have delayed appearing in Court for the purpose of defeating the Project through dilatory tactics, for which reason this Court should not permit the proposed intervention petition to delay the consideration and determination of the questions already raised in the pleadings now before it.

10. By way of further answer, these respondent aver, that it is the policy of the Federal Government to make, through its Public Works Administration, loans and grants for Project such as the Buzzard Roost Project of Greenwood County, not only for the purpose of developing undeveloped resources, but also in order to give immediate employment to a portion of the vast army of unemployed and to furnish cheap electricity and power to industries, municipalities, individuals and farmers.

11. On information, advice and belief, these defend-

(57) ants aver that the Public Works Administration allotment to it for this purpose may be withdrawn at any time by the Government, and that delay in these proceedings seriously jeopardizes the possibility of securing the aforesaid loans and grants. These defendants would further allege, on information, advice and belief, that until the final determination of these proceedings, the Federal Power Commission and the Public Works Administration will not permit the development of defendants' project.

12. By way of further answer, these defendants aver that the Southern Public Utilities and Duke Power Company, as public utilities engaged in the business of generating and selling electrical energy, have no standing in this Court to object to the proposed Buzzard Roost development, merely because such development will furnish competition with them.

WHEREFORE these defendants pray that the motion for intervention be dismissed.

(Signed) ROBINSON AND ROBINSON,
R. F. DAVIS,
W. H. NICHOLSON,
Attorneys for defendants,
Respondents.

Oct. 6th, 1934.

(Duly verified)

EX. IX.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION.

Ex Parte:

Duke Power Company and Southern Public Utilities Company, Petitioners,

(58) In re:

Dr. R. H. Park, in his own right as a Citizen and Taxpayer of the County of Greenwood, and in behalf of other Persons similarly situated, Plaintiff,

vs.

Greenwood County, et al, Defendants.

ORDER

Per Curiam:

The above named petitioners have filed with this Court a petition asking that they be allowed to interplead in the above entitled action. Upon consideration of the Return of the Defendants to the Rule to Show Cause, heretofore issued by this Court in the matter:

IT IS ORDERED that the petition be refused.

FURTHER ORDERED that the petitioners be allowed, if they so desire, to file an argument in this case upon the issue made by the pleadings.

FURTHER ORDERED that the case be set down for argument on Friday, October 12, 1934.

JOHN G. STABLER,
Senior Associate Justice,
Acting Chief Justice.

Columbia, S. C.,

October 9, 1934.

EXHIBIT X.

(to Original Bill of Complaint)

COPY

(59) THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION.

Dr. R. H. Park, in his own right as a Citizen and Taxpayer of the County of Greenwood, and on behalf of others similarly situated Plaintiff,

against

Greenwood County, and E. L. Brooks, County Supervisor and member of The Finance Board of Greenwood County, S. W. Agnew, Treasurer of Greenwood County and member of The Finance Board for Greenwood County, and E. I. Davis, member of The Finance Board for Greenwood County, Defendants.

It is agreed that the following paragraphs shall be permitted as amendments to the original complaint in the above stated action upon the hearing in this case:

1. That since the institution of this suit in the Supreme Court, the defendant, The Finance Board of Greenwood County, South Carolina, did on the..... day of October, 1934, at a special meeting of said Board, adopt a resolution entitled:

"A RESOLUTION PROVIDING FOR THE ISSUANCE OF TWO MILLION, TWO HUNDRED TWENTY THOUSAND DOLLARS ($2,220,000) REVENUE BONDS OF THE COUNTY OF GREENWOOD,

(60) SOUTH CAROLINA, FOR THE CONSTRUCTION OF A HYDRO-ELECTRIC POWER PLANT IN ACCORDANCE WITH THE PROVISIONS OF ACT 299, ACTS OF SOUTH CAROLINA, 1933, AS AMENDED AND ACT 1095, ACTS OF SOUTH CAROLINA, 1934."

wherein it is resolved that Greenwood County issue $2,220,000. of coupons bonds of said County designated "Hydro-Electric Power Revenue Bonds" for the purpose of providing funds with which to build and construct a hydro-electric plant comprising an earthen dam across Saluda River, a 15,000-KW generating station with necessary control equipment and approximately 90 miles of high and low tension distribution lines, for the purposes of furnishing electric current and power to private individuals, corporations and municipalities within and without the boundary lines of said County for domestic, commercial and industrial use. A full description of the bonds proposed to be issued is set forth in said resolution, together with the provisions for securing and paying said bonds and coupons; the said bonds recite upon their face that they are payable solely and exclusively from the revenue derived from the operation of the said hydro-electric power system, and further recite that they are issued pursuant to Act 299 of the Acts of 1933 of South Carolina, as amended, and Act of 1095 of the Acts of 1934. A true copy of said resolution is hereto attached, marked "Exhibit A" and made a part of this complaint.

2. That the acquisition and construction by the defendants of the hydro-electric plant described in said resolution and authorized to be constructed is an unlawful and illegal exercise of the powers of said County and its governing body and is contrary to and in violation of the Constitution of the State of South Carolina; that the said hydro-electric power plant does not constitute a public county purpose, nor a corporate purpose within the Constitution of said State of South Carolina; that any and all acts of the governing body of said County heretofore or hereafter taken with respect thereto are utterly void and are without authority of either the Constitution or laws of the State of South Carolina.

3. That the bonds authorized by said resolution are void and of no effect for the reason that they are to be (61) issued for the purpose of building and constructing the said hydro-electric power plant which the plaintiff alleges and avers is not a public county purpose, nor a corporate purpose within the meaning of the Constitution of South Carolina, and that said County is totally without authority to either issue the said bonds or construct the improvements mentioned in said resolution.

4. That this plaintiff is informed and believes, and so alleges, that the defendants unless restrained by this Court will proceed to build and construct the said hydro-electric plant authorized by said resolution and to issue the bonds so authorized, all of which is contrary to the Constitution and laws of the State of South Carolina.

5. That by reason of the aforementioned unlawful and unconstitutional acts of the defendants, the plaintiff as a taxpayer of Greenwood County, and all other persons similarly situated, are suffering and will continue to suffer irreparable damage for which they have no adequate remedy at law, and that the plaintiff is entitled to an Order of this Court restraining and enjoining the County of Greenwood by, or through its governing body, The Finance Board for Greenwood County, from constructing the said hydro-electric power plant and from issuing the bonds hereinbefore mentioned, and from any further commission of the unlawful acts hereinabove alleged.

WHEREFORE, the plaintiff prays, in addition to the relief asked for in its original complaint:

FIRST: That this Court issue its Rule to Show Cause directed to the defendants requiring them to Show Cause before this Court, if any they can, Why they should not be restrained and enjoined from entering into or in anywise causing to be constructed the hydro-electric plant hereinbefore in this complaint described, and from issuing or attempting to issue any of the said bonds hereinbefore described.

SECOND: That this Court declare:

(1) That the acquisition or construction of said

(62) hydro-electric power plant by the defendants is for an illegal and unlawful purpose.

(2) That the proposed bonds described in the complaint are invalid and void.

(3) For such other and further relief as to the Court seems just and equitable.

D. A. G. OUZTS,
Attorney for Plaintiff.

R. F. DAVIS &
W. H. NICHOLSON,
Attorneys for Defendants.

SUBPOENA IN EQUITY.

UNITED STATES DISTRICT COURT
.....: DIVISION, WESTERN DISTRICT OF SOUTH CAROLINA

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County—GREETING:

YOU ARE HEREBY COMMANDED that all excuses and delays set aside you be and appear within twenty days after the service of this subpoena at the Clerk's office of the United States District Court for the Western District of S. C., at Greenville, S. C. to answer unto the within bill of complaint of Duke Power Company and Southern Public Utilities Company, in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

WITNESS the Honorable H. H. Watkins, United States District Judge at Greenville, S. C., this 7th day of November A. D. 1934.

W. D. WHITE,
Clerk.
By FRANCES CLEVELAND,
Deputy Clerk.

(63)

MEMORANDUM.

The Defendants in this case are required to file their answer or other defense in the Clerk's office of said Court, on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken *pro confesso.*

RETURN OF SERVICE OF WRIT.

UNITED STATES OF AMERICA,
Western District of South Carolina, ss:

I hereby certify and return, that on the 7th day of November, 1934, I received the within Subpoena in Equity, and that on the 8th day of November, 1934, I served the same on Greenwood County by leaving a copy of said Subpoena with E. I. Davis, Secretary of the Finance Board of Greenwood County; served E. L. Brooks by leaving a copy with E. I. Davis, Secretary of the Finance Board of Greenwood County; served S. A. Agnew and E. I. Davis by leaving a copy with each of them personally at their offices in Greenwood County.

REUBEN GOSNELL,
United States Marshal.
By G. C. HENDERSON,
Deputy United States Marshal.

Marshal's Fees

Travel . . . . . $....
Service 8.00

$8.00

United States District Court
West. Dist. of So. Car.
NOV. 12 1934
FILED
.....A. M. ..... P. M.
W. D. WHITE, Clerk

(64) GREENWOOD DIVISION

No. Eq. 451

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County, and E. L. Brooks, S. A. Agnew, et al. etc. Defendants.

SUBPOENA IN EQUITY

Returnable on the ..... day of....., 19....

United States District Court
West. Dist. of So. Car.
NOV. 7 1934
FILED
.....A. M. ..... P. M.
W. D. WHITE, Clerk

H. J. HAYNSWORTH,
W. R. PERKINS,
J. H. MARION,
W S. O'B. ROBINSON, JR.,
Solicitor for Plaintiff.

(65) ORDER MAKING HAROLD L. ICKES AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS A PARTY DEFENDANT.

United States District Court
West. Dist. of So. Car.
DEC 4 1934
FILED
.....A. M. ..... P. M.
W. D. WHITE, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs. In Equity No. 451

Greenwood County, et al. Defendants.

This cause coming on for hearing on the application of Harold L. Ickes, as Federal Emergency Administrator of Public Works, to be made a party defendant herein, said party appearing by Henry T. Hunt, Special Assistant to the Attorney General of the United States, and it appearing to the court that said Harold L. Ickes as such Administrator has or claims an interest adverse to the plaintiff in this case, and that the presence of said party is necessary or proper to a complete determination of this case:

It is ordered, adjudged and decreed that the said Harold L. Ickes, as Federal Emergency Administrator of Public Works, be, and he is hereby made a party defendant herein and is given to and including December 7, 1934, in which to appear and plead to the bill of complaint filed herein dated November 7, 1934.

H. H. WATKINS,
United States District Judge.

Dec. 4, 1934.

SEPARATE ANSWER OF DEFENDANT HAROLD L. ICKES AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS.

(66) Filed January 17, 1935.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs. In Equity No. 451

Greenwood County, E. L. Brooks, S. A. Agnew, and E. I. Davis, as members of and constituting the Finance Board for Greenwood County, and Harold L. Ickes as Federal Emergency Administrator of Public Works, Defendants.

To the Honorable Henry H. Watkins, Judge of the District Court of the United States for the Western District of South Carolina:

Harold L. Ickes, as Federal Emergency Administrator of Public Works, answering the bill of complaint herein states:

I. Defendant admits that the plaintiff, Duke Power Company, is a corporation organized and existing under the laws of the State of New Jersey, but has no knowledge as to the remaining allegations of paragraph I of the complaint.

II. Defendant admits that the plaintiff, Southern Public Utilities Company, is a corporation organized and existing under the laws of the State of Maine, but has no knowledge as to the remaining allegations of paragraph II of the complaint.

III. Defendant admits the allegations of paragraph III of the complaint.

(67) IV. Defendant admits that this is a suit of a civil nature in equity by citizens of different states and that the value of the matter in controversy in this suit exceeds $3,000, exclusive of interest and costs. Defendant admits that the plaintiffs attempt to invoke the jurisdiction of this Court upon the additional ground that this suit arises under the Constitution and laws of the United States, but denies that the facts in the complaint are sufficient to raise any question under the Constitution and laws of the United States and avers that upon such facts this Court has no judicial power to review or determine the constitutionality of the National Industrial Recovery Act and that the complaint shows upon its face that the plaintiffs have not suffered and are not threatened with suffering any injury sufficient to give them any standing in this Court to question the constitutionality of said Act.

V. Defendant has no knowledge as to the allegations contained in paragraph V of the complaint.

VI. Defendant has no knowledge as to the allegations contained in paragraph VI of the complaint.

VII. Defendant has no knowledge as to the allegations contained in paragraph VII of the complaint.

VIII. Defendant admits that the defendant Greenwood County proposes to construct and operate on the Saluda River in South Carolina, at or near a point known as "Buzzard Roost", a hydro-electric plant with transmission and distribution lines extending into the Counties of Greenwood, Newberry and Laurens, for the purpose of furnishing electric current and power to cities and towns, industries and private individuals in said Counties. Defendant admits that the Finance Board of Greenwood County, on October 6, 1934, adopted a certain resolution, a copy of which is annexed to the complaint as "Exhibit I". Defendant has no knowledge as to the allegations of paragraph VIII of the complaint not herein specifically admitted.

IX. Defendant admits that the defendant Greenwood County has made application to the Federal Power Commission for approval of said hydro-electric project and

(68) has caused an estimate to be made of the cost of constructing said project which estimate amounts to $2,767,000, and that said application estimates that said project will produce annually for sale primary power of approximately 30,000,000 K.W.H. and secondary power of approximately 20,000,000 K.W.H. Defendant admits that said application to the Federal Power Commission contained a schedule of rates as shown by "Exhibit II" annexed to the complaint.

X. Defendant admits that the defendant Greenwood County filed an application with the Federal Emergency Administration of Public Works for a loan and grant in the sum of $2,767,000 to finance the construction of said hydro-electric project. Defendant avers that said application, including plans, specifications, cost estimates, etc. for said project, has been examined by the Engineering Division of the Federal Emergency Administration of Public Works and the total cost of constructing said project together with incidental costs, fees, etc. has been estimated by said Engineering Division to be $2,852,000. Said cost estimate has been approved by this defendant and an allotment of funds in the amount of $2,852,000 (to be available partly as a loan and partly as a grant) has been made for said project pursuant to the provisions of the National Industrial Recovery Act. Defendant avers, upon information and belief, that the total cost of said hydro-electric project as described in said application to the Federal Emergency Administration of Public Works will not exceed the sum of $2,852,000.

XI. Defendant admits that the defendant Greenwood County has entered into a contract, known as a "loan and grant agreement", with the United States of America, a copy of which contract is annexed hereto as "Exhibit A" and made a part of this answer and to which defendant asks reference for the terms thereof. Defendant admits that by said resolution of the Finance Board of Greenwood County adopted October 6, 1934, and in the text of the bonds proposed to be issued pursuant to said resolution the defendant Greenwood County agrees that it will continuously operate said hydro-electric power system and fix and maintain rates for the services furnished by said system sufficient at all times

(69) to provide for the payment of the interest on and principal of such bonds and to provide for operation, maintenance and reserve funds as required by the laws of the State of South Carolina. Except as hereinabove specifically admitted defendant denies each and every allegation contained in paragraph X1. of the complaint.

XII. Defendant has no knowledge as to allegation of paragraph XII of the complaint that the plaintiffs have caused said application of the defendant Greenwood County to the Federal Emergency Administration of Public Works and the plans and estimates accompanying it to be studied by competent engineers. Defendant denies, upon information and belief, each of the remaining allegations contained in paragraph XII of the complaint. Defendant avers that the estimate of the cost of construction of said hydro-electric project as made by the Engineering Division of the Federal Emergency Administration of Public Works has been adopted by the defendant Greenwood County as appears by the above mentioned contract executed by and between said defendant and the United States of America; that the estimates of the cost of said project, maintenance and operation costs and power output, and initial rate schedules, are matters exclusively within the determination of the Finance Board of the defendant Greenwood County as provided by the laws of the State of South Carolina authorizing the construction and financing of said project and such matters are not subject to judicial review by this Court; that the accuracy of such estimates and the probable sufficiency of such initial rate schedules are immaterial to the determination of this cause.

XIII. Defendant admits the allegations of paragraph XIII of the complaint.

XIV. Defendant has no knowledge as to the allegations of paragraph XIV of the complaint.

XV. Defendant denies each and every allegation contained in paragraph XV of the complaint. Defendant avers that the General Assembly of the State of South Carolina has by special Act authorized the construction of this project and has expressly declared said project to be self-liquidating; that by Act No. 1095 of the Acts

(70) of said General Assembly, Regular Session, 1934, the Finance Board of the defendant Greenwood County is authorized and empowered to contract with and borrow from the Federal Emergency Administration of Public Works for the construction of said project; that by Section 2 of said Act

"It is declared that this project is a self-liquidating project and that any indebtedness or obligation created by the said Board shall not be a direct and primary obligation of the County of Greenwood; * * * ."

XVI. Defendant denies, upon information and belief, that the proposed schedule of rates fixed by said resolution of the Finance Board of the defendant Greenwood County and stated in said applications of Greenwood County to the Federal Emergency Administration of Public Works and to the Federal Power Commission are or will be inadequate to meet the requirements of the laws of the State of South Carolina with respect to such rates, and denies that such rates and the fixing thereof do not or will not constitute a compliance with the requirements of said laws as respects said Buzzard Roost project. Defendant further denies that the fixing of said rates, or the issuing of the proposed revenue bonds by the defendant Greenwood County, or the making of contracts by said County on the basis of said rates for power to be produced by said project, are or will be in any way unauthorized or illegal or will constitute illegal competition with the business of the plaintiffs. Defendant avers that the sufficiency of said initial rate schedule fixed by resolution of the Finance Board of the defendant Greenwood County is immaterial to the determination of this cause in that the plaintiffs are in no way injured or aggrieved thereby and in that such rates are subject to revision by the County if they are found to be insufficient.

XVII. Defendant admits that the said hydro-electric project includes the construction of transmission lines outside the limits of Greenwood County and that the defendant Greenwood County proposes to distribute and sell electric current to consumers in the Counties of Newberry and Laurens. Defendant denies that said County has no authority to construct such transmission

(71) lines and to distribute and sell electric current beyond the limits of said County, and denies that the distribution and sale of power beyond the limits of said County will be an illegal or *ultra vires* act on the part of said County or will constitute illegal competition with the plaintiffs. Defendant avers that the defendant Greenwood County has full power and authority under the laws of the State of South Carolina to construct such transmission lines and to sell and distribute electricity outside and beyond the limits of the County.

XVIII. Defendant admits that the said hydro-electric project will be constructed and operated solely within the State of South Carolina and is not intended to engage in interstate commerce. Except as so expressly admitted defendant denies each and every allegation contained in paragraph XVIII of the complaint.

XIX. Defendant admits that the defendant Greenwood County, acting by and through its Finance Board, has entered into a contract with the United States of America, a copy of said contract being annexed to this answer as "Exhibit A" and made a part hereof. Except as so expressly admitted defendant denies each and every allegation contained in paragraph XIX of the complaint.

XX. Defendant denies each and every allegation contained in paragraph XX of the complaint.

XXI. Defendant admits that on or about October 31, 1934, the Supreme Court of the State of South Carolina filed its opinion in the case of Park v. Greenwood County, et al. Defendant asks reference to the pleadings and decision in that cause for the issues raised and decided therein. Defendant admits that the plaintiffs herein filed in that suit a petition praying leave to interplead therein and that by order entered on or about October 9, 1934, the Supreme Court of South Carolina refused said petition to interplead but permitted said petitioners to file argument with said Court upon the issues made by the pleadings; that said petitioners failed and refused to file such argument.

FOR A FIRST SEPARATE AND COMPLETE DEFENSE DEFENDANT ALLEGES:

(72) XXII. That upon the face of the bill of complaint it appears as a matter of law that the facts alleged in said complaint are insufficient to constitute a valid cause of action.

FOR A SECOND SEPARATE AND COMPLETE DEFENSE DEFENDANT ALLEGES:

XXIII. That the decision of the Supreme Court of South Carolina in the case of Park v. Greenwood County, et al, is decisive and binding upon the parties to this suit as to all the issues raised by the bill of complaint herein, and said issues are therefore *res adjudicata.*

FOR A THIRD SEPARATE AND PARTIAL DEFENSE DEFENDANT ALLEGES:

XXIV. That the decision of the Supreme Court of the State of South Carolina in the case of Park v. Greenwood County, et al, is decisive of all the issues raised in the bill of complaint herein as to the construction of the constitution and statutes of the State of South Carolina and as to the power and authority of the defendant Greenwood County to construct and operate the proposed hydro-electric project and to finance such construction and operation by means of the issuance and sale of revenue bonds and the fixing, charging and collecting of rates in the manner proposed and set forth in and by the said resolution of the Finance Board of Greenwood County adopted on or about October 6, 1934; and that said decision upon said issues is binding and conclusive upon this court.

WHEREFORE, this defendant prays judgment that the bill of complaint of the plaintiffs be dismissed.

HENRY T. HUNT,
As Special Assistant to the Attorney General, Attorney for the defendant Harold L. Ickes as Federal Emergency Administrator of Public Works.

Dated, Washington, D. C.
January 14, 1935.

(73)

EX. A.

(To Answer of H. L. Ickes to Original Bill of Complaint)

P. W. 22707

LOAN AND GRANT AGREEMENT

between the

County of Greenwood

South Carolina

and the

UNITED STATES OF AMERICA

P. W. A. Docket No. 3972

PART ONE

1. Purpose of Agreement. Subject to the terms and conditions of this Agreement, the United States of America (herein called the "Government") will, by loan and grant not exceeding in the aggregate the sum of $2,852,000 (herein called the "Allotment") aid the County of Greenwood, South Carolina (herein called the "Borrower") in financing a project (herein called the "Project") consisting substantially of constructing a hydro-electric plant comprising an earthen dam across the Saluda River, a 15,000 K. W. Generating Station with necessary control equipment, transmission lines and rural distribution all pursuant to the Borrower's application (herein called the "Application), P. W. A. Docket No. 3972, Title II of the National Industrial Recovery Act (herein called the "Act") and the Constitution and Statutes of the State of South Carolina (herein called the "State").

2. Amount and Method of Making Loan. The Borrower will sell and the Government will buy, at the principal amount thereof plus accrued interest, $2,284,000 aggregate principal amount of negotiable coupons bonds (herein called the "Bonds") of the description outlined

(74) below or such other description as may be satisfactory to the Borrower and to the Administrator, bearing interest at the rate of 4 per cent per annum, payable semi-annually from date until maturity, less such amount of the Bonds, if any, as the Borrower may sell to purchasers other than the Government.

(a) Date: October 1, 1934. (b) Denomination: $1,000.

(c) Place of Payment: At the office of the Treasurer of the Borrower in the City of Greenwood, South Carolina or, at the option of the holder, at the office of the fiscal agent of the Borrower in the Borough of Manhattan, City and State of New York.

(d) Registration Privileges: Registerable at the option of the holder as to principal only.

(e) Maturities: Payable, without option of prior redemption, on the first day of October in years and amounts as follows:

Year	Amount	Year	Amount
1936	$50,000	1949	$ 95,000
1937	55,000	1950	95,000
1938	60,000	1951	100,000
1939	65,000	1952	105,000
1940	70,000	1953	110,000
1941	70,000	1954	115,000
1942	75,000	1955	115,000
1943	75,000	1956	115,000
1944	75,000	1957	120,000
1945	80,000	1958	125,000
1946	85,000	1959	125,000
1947	90,000	1960	124,000
1948	90,000		

(f) Security: Special obligations of the Borrower, payable solely from and secured by the pledge of, and first lien on a fixed amount of the gross revenues derived from the operation of the entire hydro-electric power generating transmission and distribution system, which fixed amount shall be sufficient at all times to pay the principal of and interest on the Bonds as and when the same become due and payable, and additionally se-

(75) cured by a statutory lien upon the system and any extensions or appurtenances thereto.

3. Amount and Method of Making Grant. The Government will make and the Borrower will accept, (whether or not any or all of the Bonds are sold to purchasers other than the Government,) a grant (herein called the "Grant") in an amount equal to 30 per centum of the cost of the labor and materials employed upon the Project. (The determination by the Federal Emergency Administrator of Public Works (herein called the "Administrator") of the cost of the labor and materials employed upon the Project shall be conclusive. The Government will make part of the Grant by payment of money and the remainder of the Grant by cancellation of Bonds or interest coupons or both. If all of the Bonds are sold to purchasers other than the Government, the Government will make the entire Grant by payment of money.) In no event shall the Grant, whether made partly by payment of money and partly by cancellation, or wholly by payment of money, be in excess of $682,000.

4. Bond Proceedings. When the Agreement has been executed, the Borrower (unless it has already done so) shall promptly take all proceedings necessary for the authorization and issuance of the Bonds.

5. Bond and Grant Requisitions. From time to time after the execution of this Agreement, the Borrower shall file a requisition with the Government requesting the Government to take up and pay for Bonds or to make a payment on account of the Grant. Each requisition shall be accompanied by such documents as may be requested by the Administrator (a requisition together with such documents being herein collectively called a "requisition").

6. Bond Purchases. If a Requisition requesting the Government to take up and pay for Bonds is satisfactory in form and substance to the Adiministrator, the Government, within a reasonable time after the receipt of such Requisition, will take up and pay for Bonds, (having maturities satisfactory to the Administrator, in such amount as will provide, in the judgment of the Administrator, sufficient funds for the construction of the Project

(76) for a reasonable period. Payment for such Bonds shall be made at a Federal Reserve Bank to be designated by the Administrator or at such other place or places as the Administrator may designate, against delivery by the Borrower of such Bonds, having all unmatured interest coupons attached thereto, together with such documents as may be requested by the Administrator. The Government shall be under no obligation to take up and pay for Bonds beyond the amount which in the judgment of the Administrator is needed by the Borrower to complete the Project).

7. Grant by Payment of Money. If a Requisition requesting the Government to make a payment on account of the Grant is satisfactory in form and substance to the Administrator, the Government will pay to the Borrower at such place or places as the Administrator may designate against delivery by the Borrower of its receipt therefor, a sum of money equal to the difference between the aggregate amount previously paid on account of the Grant, and

(a) 25 per centum of the cost of the labor and materials shown in the Requisition to have been employed upon the Project if the Requisition shows that the Project has not been completed, or

(b) 30 per centum of the cost of such labor and materials if the Requisition shows that the Project has been completed and that all costs incurred in connection therewith have been determined;

provided, however, that the part of the Grant made by payment of money to the Borrower shall not be in excess of the difference between the Allotment and the amount paid (not including the amount paid as accrued interest) for the Bonds taken up by the Government. The Government reserves the right to make any part of the Grant by cancellation of Bonds or interest coupons or both rather than by payment of money if, in the judgment of the Administrator, the Borrower does not need the money to pay costs incurred in connection with the construction of the Project.

8. Grant by Cancellation of Bonds. If the Bor-

(77) rower, within a reasonable time after the completion of the Project, shall have filed a Requisition, satisfactory in form and substance to the Administrator, then the Government will cancel such Bonds and interest coupons as may be selected by the Administrator in an aggregate amount equal (as nearly as may be) to the difference between 30 per centum of the cost of the labor and materials employed upon the Project and the part of the Grant made by payment of money. The Government will hold Bonds or interest coupons for such reasonable time in an amount sufficient to permit compliance with provisions of this Paragraph, unless payment of such difference shall have been otherwise provided for by the Government.

9. Grant Advances. At any time after the execution of this Agreement the Government may, upon request of the Borrower, if in the judgment of the Administrator the circumstances so warrant, make advances to the Borrower on account of the Grant, but such advances shall not be in excess of 30 per centum of the cost of the labor and materials to be employed upon the Project, as estimated by the Administrator.

10. Deposit of Bond Proceeds and Grant; Bond Fund; Construction Accounts. The Borrower shall deposit all accrued interest which it receives from the sale of the Bonds at the time of the payment therefor and any payment on account of the Grant which may be made under the provisions of Paragraph 8, PART ONE, hereof, into an interest and bond retirement fund account (herein called the "Bond Fund") promptly upon the receipt of such accrued interest or such payment on account of the Grant. It will deposit the remaining proceeds from the sale of the Bonds (whether such Bonds are sold to the Government or other purchasers) and the part of the Grant made by payment of money under the provisions of Paragraph 7, PART ONE, hereof, promptly upon the receipt of such proceeds or payments in a separtae account or accounts (each of such separate accounts herein called a "Construction Account"), in a bank or banks which are members of the Federal Reserve System and of the Federal Deposit Insurance Corporation and which shall be satisfactory at all times to the Administrator.

(78) 10-(a) Funds from Sale of Timber. Funds received from sale of timber cleared from submerged land shall be paid into the Bond Fund or, into the Construction Account at the election of the Administrator.

11. Disbursement of Monies in Construction Accounts and in Bond Fund. The Borrower shall expend the monies in a Construction Account only for such purposes as shall have been previously specified in Requisitions filed with the Government and as shall have been approved by the Administrator. Any monies remaining unexpended in any Construction Account after the completion of the Project which are not required to meet obligations incurred in connection with the construction of the Project shall either be paid into the Bond Fund, or said monies shall be used for the purchase of such of the Bonds as are then outstanding (at a price not exceeding the principal amount thereof plus accrued interest. Any Bonds so purchased shall be cancelled and no additional Bonds shall be issued in lieu thereof.) The monies in the Bond Fund shall be used solely for the purpose of paying interest on and principal of the Bonds.

12. Other Financial Aid from the Government. If the Borrower shall receive any funds (other than those received under this Agreement) directly or indirectly from the Government, or any agency or instrumentality thereof, to aid in financing the construction of the Project, to the extent that such funds are so received the Grant shall be reduced, and to the extent that such funds so received exceed the part of the Grant which would otherwise be made by payment of money, the aggregate principal amount of Bonds to be purchased by the Government shall be reduced.

13. Construction of Project. Not later than upon the receipt by it of the first Bond payment, the Borrower will commence or cause to be commenced the construction of the Project, and the Borrower will thereafter continue such construction or cause it to be continued to completion with all practicable dispatch, in an efficient and economical manner, at a reasonable cost and in accordance with the provisions of this Agreement, plans, drawings, specifications and construction contracts which

(79) shall be satisfactory to the Administrator, and under such engineering supervision and inspection as the Administrator may require. Except with the written consent of the Administrator, no materials or equipment for the Project shall be purchased by the Borrower subject to any chattel mortgage, or any conditional sale or title retention agreement; provided, that nothing contained in this section shall be construed as imposing a liability of any character upon the general credit and taxing power of Greenwood County.

13. (a) Transmission Line. All transmission lines, wish-bone cross-arms, used by the applicant shall be of welded galvanized steel and not of creosoted timber and, in the event that telephone cables be added to 44 K.B. lines, instantaneous, not inverse, time limit relays shall be used on generator panels.

14. Information. During the construction of the Project the Borrower will furnish to the Government all such information and data as the Administrator may request as to the construction, cost and progress of the work. The Borrower will furnish to the Government and to any purchaser from the Government of 25 per centum of the Bonds, such financial statements and other information and data relating to the Borrower as the Administrator or any such purchaser may at any time reasonable require.

15. Representations and Warranties. The Borrower represents and warrants as follows:

(a) Financial Condition. The character of the assets and the financial condition of the Borrower are as favorable as at the date of the Borrower's most recent financial statement, furnished to the Government as a part of the Application, and there have been no changes in the character of such assets or in such financial condition except such changes as are necessary and incidental to the ordinary and usual conduct of the Borrower's affairs;

(b) Fees and Commissions. It has not and does not intend to pay any bonus, fee or commission in order to secure the loan or grant hereunder;

(80) (c) Affirmation. Every statement contained in this Agreement, in the Application, and in any supplement thereto or amendment thereof, and in any other document submitted to the Government is correct and complete, and no relevant fact materially affecting the Bonds, the security therefor, the Grant or the Project, or the obligations of the Borrower under this Agreement has been omitted therefrom.

16. Bond Circular. The Borrower will furnish all such information in proper form for the preparation of a Bond Circular and will take all such steps as the Government or any purchaser or purchasers from the Government of not less than 25 per centum of the Bonds may reasonably request to aid in the sale by the Government or such purchaser or purchasers of any or all of the Bonds.

17. Expenses. The Government shall be under no obligation to pay any costs, charges or expenses incident to compliance with any of the duties or obligations of the Borrower under this Agreement including, without limiting the generality of the foregoing, the cost of preparing, executing and delivering the Bonds, and any legal, engineering and accounting costs, charges or expenses incurred by the Borrower.

18. Waiver. Any provision of this Agreement may be waived or amended with the consent of the Borrower and the written approval of the Administrator, without the execution of a new or supplemental agreement.

19. Interest of Member of Congress. No Member of or Delegate to the Congress of the United States of America shall be admitted to any share or part of this Agreement, or to any benefit to arise thereupon.

20. Validation. The Borrower hereby covenants that it will institute, prosecute and carry to completion in so far as it may be within the power of the Borrower, any and all acts and things to be performed or done to secure the enactment of legislation or to accomplish such other proceedings, judicial or otherwise, as may be necessary, appropriate or advisable to empower the Bor-

(81) rower to issue the Bonds and to remedy any defects, illegalities and irregularities in the proceedings of the Borrower relative to the issuance of the Bonds and to validate the same after the issuance thereof to the Government, if in the judgment of the Administrator such action may be deemed necessary, appropriate or advisable. The Borrower further covenants that it will procure and furnish to the Government, as a condition precedent to the Government's obligations hereunder a letter from the Governor of the State stating that if in the judgment of the Administrator it may be advisable to enact legislation to empower the Borrower to issue the Bonds or to remedy any defects, illegalities or irregularities in the proceedings of the Borrower relative to the issuance thereof or to validate the same, said Governor will recommend and cooperate in the enactment of such legislation.

21. Naming of Project. The Project shall never be named except with the written consent of the Administrator.

22. Undue Delay by the Borrower. If in the opinion of the Administrator, which shall be conclusive, the Borrower shall delay for an unreasonable time in carrying out any of the duties or obligations to be performed by it under the terms of this Agreement, the Administrator may cancel this Agreement.

23. Conditions Precedent to the Government's Obligations. The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:

(a) Financial Condition and Budget. If, in the judgment of the Administrator, the financial condition of the Borrower shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government, (or the Borrower shall have failed to balance its budget satisfactorily or shall have failed to take action reasonably designed to bring the ordinary current expenditures of the Borrower within the prudently estimated revenues thereof);

(b) Cost of Project. If the Administrator shall not

(82) be satisfied that the Borrower will be able to complete the Project for the sum of $2,852,000, or that the Borrower will be able to obtain, in a manner satisfactory to the Administrator, any additional funds which the Administrator shall estimate to be necessary to complete the Project;

(c) Compliance. If the Administrator shall not be satisfied that the Borrower has complied with all the provisions contained in this Agreement or in the proceedings authorizing the issuance of the Bonds, theretofore to be complied with by the Borrower;

(d) Legal Matters. If the Administrator shall not be satisfied as to all legal matters and proceedings affecting the Bonds, the security therefor or the construction of the Project;

(e) Representations. If any representation made by the Borrower in this Agreement or in the Application or in any supplement thereto or amendment thereof, or in any document submitted to the Government by the Borrower shall be found by the Administrator to be incorrect or incomplete in any material respect;

(f) Maturity of Bonds Sold to Government. If, in the event that some of the Bonds are sold to purchasers other than the Government, the maturities of the remaining Bonds are not satisfactory to the Administrator;

(g) Litigation. If the Administrator shall not be satisfied that all pending litigation or litigations hereafter instituted has been so adjudicated that the validity of the bonds, the security offered, the construction and operation of the project have not been adversely affected.

(h) Licenses. If the Administrator shall not be satisfied that the Borrower has obtained the necessary permit and/or license from the Federal Power Commission and such other permits and licenses as may be necessary to construct and operate the project.

(i) Rate Resolution and Bond Resolution. If the

(83) Borrower shall not have adopted a resolution satisfactory in form and substance to the Administrator, providing for rates to be charged for services afforded by the hydro-electric system, and shall not have adopted a resolution, satisfactory in form and substance to the Administrator, authorizing the issuance of the Bonds.

(j) Specifications and Contracts. If the specifications of materials to be used in the Construction of the Project and the bids and/or contracts entered into between the Borrower and contractors shall not be satisfactory in form and substance to the Administrator.

(k) Contract for sale of electric current. If the Borrower shall not have obtained legal contracts with municipalities, corporations or other consumers for the sale of current and power, which contracts shall be satisfactory to the Administrator as to form, substance and aggregate amount of current to be sold under such contracts, which contracts shall be for a period of at least five years providing for the sale of at least twenty-five million k.w.h. per year of firm power at an average annual rate of not less than 7.6 mills per k.w.h. and for the sale of approximately 5,000,000 k.w.h. per year of secondary power at approximately 5 mills per k.w.h., or the Borrower shall obtain contracts, or submit evidence, satisfactory to the Administrator that the Borrower will sell a sufficient amount of K.W. hours as will in the opinion of the Administrator produce the equivalent total revenues.

24. Special Covenant: Rural Telephone Distribution Lines. In the event that the applicant shall permit the use of the radial rural distribution line for a telephone system, a rate of not less than $1.00 per subscriber per year shall be charged for this service.

PART TWO

IN CONSIDERATION OF THE GRANT, THE BORROWER COVENANTS THAT:

1. Construction Work. All work on the Project shall

(84) be done subject to the rules and regulations adopted by the Administrator to carry out the purposes and control the administration of the Act. The following rules and regulations as set out in Bulletin No. 2, Non-Federal Projects revised March 3, 1934, entitled "P.W.A. REQUIREMENTS as to BIDS, CONTRACTORS' BONDS, AND CONTRACT, WAGE, AND LABOR PROVISIONS AND GENERAL INSTRUCTIONS as to APPLICATIONS AND LOANS AND GRANTS", with all blank spaces filled in as provided in said Bulletin, shall be incorporated verbatim in *ALL CONSTRUCTION CONTRACTS* for work on the Project. (Particular care should be taken that in all such construction contracts *the following words* are inserted in the blank space in Paragraph 3 (a) (1): "County of Greenwood and/or the County of Newberry, and/or the County of Laurens" and *the following words* are inserted in the blank space in Paragraph 3 (a) (2): "State of South Carolina").

"1. (a) Convict labor.—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project.

"(b) Thirty-hour week.—Except in executive, administrative, and supervisory positions, so far as practicable and feasible in the judgment of the Government engineer, no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any 1 week: Provided, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

"(c) No work shall be permitted on Sundays or legal holidays except in cases of emergency.

"2. Wages.—(a) All employees directly employed on this work shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort. Such wages shall in no event be less than the minimum hourly wage rates for skilled and

(85) unskilled labor prescribed by the Administrator for the zone or zones in which the work is to be done, viz:

Skilled labor . . . . . .
Unskilled labor . . . . . .

"(b) In the event that the prevailing hourly rates prescribed under collective agreements or understandings between organized labor and employers in effect on April 30, 1933, shall be above the minimum rates specified above, such agreed wage rates shall apply: Provided, That such agreed wages rates shall be effective for the period of this contract, but not to exceed 12 months from the date of the contract.

"(c) The above designated minimum rates are not to be used in diseriminating against assistants, helpers, apprentices, and serving laborers who work and serve skilled journeymen mechanics and who are not to be termed as "unskilled laborers".

"(d) The provisions of this contract relating to hours and minimum wage rates for labor directly employed on the project shall for the purposes of this contract, to the extent applicable, supersede the terms of any code adopted under Title I of the act permitting longer hours or lower minimum wage rates.

"(e) All employees shall be paid in full not less often than once each week and in lawful money of the United States, unless otherwise permitted by the Government engineer, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: Provided, however, That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical aid insurance, in such amounts as are authorized by the laws of South Carolina to be paid by employees, in those cases in which, after the making of the deductions, the wage

(86) rates will not be lower than the minimum wage rates herein established.

"(f) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the laws of South Carolina, should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the engineer inspector shall be furnished with a sworn statement thereof on demand.

"(g) The Board of Labor Review (herein called the "Board") shall hear all labor issues arising under the operation of this contract and such issues as may result from fundamental changes in economic conditions during the life of this contract.

"(h) The minimum wage rates herein established shall be subject to change by the Administrator on recommendation of the Board. In the event that, as a result of fundamental changes in economic conditions, the Administrator, acting on such recommendation, from time to time establishes different minimum wage rates (referred to in paragraph 2 (a), (b), and (c) hereof) all contracts for work on the project shall be adjusted accordingly by the parties thereto so that the contract price to the contractor under any contract or to any subcontractor under any sub-contract shall be increased by an amount equal to any such increased cost, or decreased in an amount equal to such decreased cost.

"(i) Engineers, architects, and other professional and sub-professional employees engaged in duties normally done at the site of the project shall receive at least the prevailing rates for the various types of service to be rendered, provided that in no case shall professional employees receive less than the following weekly compensation for 40 hours or less irrespective of the number of hours employed: $36.00 in the northern zone;

(87) $33.00 in the central zone; and $30.00 in the Southern zone. Where the working week is longer than 40 hours, weekly compensation shall be increased proportionally. Compensation under this paragraph shall be subject to the approval of the Government Engineer.

"3. (a) Labor preferences.—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivision and/or county) . . . . . and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or district) . . . . . : Provided, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates.

"(b) Employment services.—To the fullest extent possible, labor required for the project and appropriate to be secured through employment services shall be chosen from the lists of qualified workers submitted by local employment agencies designated by the United States Employment Service: Provided, however, That union labor, skilled and unskilled, shall not be required to register at such local employment agencies but, if such labor is desired by the employer, shall be secured in the customary ways through recognized union locals. In the event, however, that employers who wish to employ union labor are not furnished with qualified union workers by the union locals which are authorized to furnish such labor residing in the locality within 48 hours (Sundays and holidays excluded) after request is filed by the employer, all labor shall be chosen from lists of qualified workers submitted by local agencies designated by the United States Employment Service. In the selection of workers from lists prepared by such employment agencies and union locals, the labor preferences provided in section (a) of this paragraph 3 shall be observed, and preference shall be given to those unemployed at the date of registration who, at the date of selection, have no other available employment.

(88) "(c) Compliance with Title I of the Act.—The following sections 7 (a) (1) and 7 (a) (2) of Title I of the Act shall be observed:

"(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraints, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employees and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

"4. Human labor.—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

"5. Compensation insurance.—Every employer of labor shall provide, if permitted by the laws of South Carolina, adequate workmen's compensation insurance for all labor employed by him on the project who may come within the protection of such laws and shall provide, where practicable, employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Government engineer shall be given. Where it is not permitted by law that such insurance be provided, some method satisfactory to the Administrator must be provided by which the employees may, by paying the entire amount of the premiums, derive a similar protection.

"6. Persons entitled to benefits of labor provisions.—There shall be extended to every person who performs the work of a laborer or of a mechanic on the project

(89) or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

"7. Withholding payment.—Under all construction contracts, Greenwood County may withhold from the (The borrower)
contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

"8. Accident prevention.—Reasonable precautions shall at all times be exercised for the safety of employees on the work and applicable provisions of the Federal, State, and municipal safety laws and building and construction codes shall be observed. All machinery and equipment and other physical hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction of the Associated General Contractors of America, unless and to the extent that such provisions are incompatible with Federal, State, or municipal laws or regulations.

"9. N. R. A. Compliance.—The contractor shall comply with each approved code of fair competition to which he is subject, and if he is engaged in any trade or industry for which there is no approved code of fair competition, then as to such trade or industry with an agreement with the President under Section 4 (a) of the National Industrial Recovery Act (President's Reemployment Agreement), and Greenwood County shall have (The borrower)
the right, subject to the approval of the Government engineer, to cancel this contract for failure to comply with this provision and make open market purchases or have the work called for by this contract otherwise performed at the expense of the contractor. So far as articles, materials or supplies produced in the United States are concerned, no articles, materials or supplies shall

(90) be accepted or purchased for the performance of the work nor shall any subcontracts be entered into for any articles, materials or supplies, in whole or in part produced or furnished by any person who shall not have certified that he is complying with and will continue to comply with each code of fair competition which relates to such articles, materials or supplies, and/or in case there is no approved code for the whole or any portion thereof then to that extent with an agreement with the President as aforesaid.

"10. (a) Inspection of records.—The Administrator, through his authorized agents, shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. There shall be submitted to the Administrator, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Administrator, through his authorized agents, may require. The submission and approval of said schedules, if required, shall be a condition precedent to the making of any payment under the contract.

"(b) There shall be provided for the use of the engineer inspector such reasonable facilities as he may request. In case of dispute the Government engineer shall determine the reasonableness of the request.

"11. Reports.—Every employer of labor on the project shall report within 5 days after the close of each calendar month, on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours work, wage scales paid to the various classes of labor, and the total expenditures for materials. Two copies of each of such monthly reports are to be furnished to the Government engineer, and one copy of each to the United States Department of Labor. The contractor under any construction contract shall also

(91) furnish to Greenwood County, to the Government
(The borrower)
engineer and to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

"12. There shall be provided all necessary services and all materials, tools, implements, and appliances required to perform and complete entirely and in a workmanlike manner the work provided for in this contract. Except as otherwise approved in writing by the Government engineer, such services shall be paid for in full at least once a month and such materials, tools, implements and appliances shall be paid for at least once a month to the extent of 90 per cent of the cost thereof to the contractor, and the remaining 10 per cent shall be paid 30 days after the completion of the part of the work in or on which such materials, tools, implements, or appliances are incorporated or used.

"13. Signs.—Signs bearing the legend Public Works Project No. 3972 shall be erected in appropriate places at the site of the project.

"14. All reasonable rules and regulations which the Public Works Administration may prescribe toward the effectuation of the matters covered by paragraphs 1 to 13 inclusive, shall be observed in the performance of the work.

"15. Subcontractors.—(a) Appropriate provisions shall be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract affecting such subcontractors, particularly paragraphs 1 to 14, inclusive.

"(b) No bid shall be received from any subcontractor who has not signed U. S. Government Form No. P. W. A. 61, revised (March 1934).

"16. Termination for breach.—In the event that any of the provisions of paragraphs 1 to 15, inclusive, of this contract are violated by the contractor under the construction contract or by any subcontractor under any

(92) subcontract on the work, Greenwood County may, (The borrower) subject to the approval of the Government engineer, and upon request of the Administrator, shall terminate the contract by serving written notice upon the contractor of its intention to terminate such contract, and, unless within 10 days after the serving of such notice such violation shall cease, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination Greenwood County may take (The borrower) over the work and prosecute the same to completion or otherwise for the account and at the expense of the contractor and/or such subcontractor, and the contractor and his sureties shall be liable to Greenwood County (The borrower) for any excess cost occasioned Greenwood County in the (The borrower) event of any such termination, and Greenwood County (The borrower) may take possesion of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work, and necessary therefor. This clause shall not be construed to prevent the termination for other causes provided in the construction contract.

"17. Definitions.—The term "Act" as used herein refers to the National Industrial Recovery Act. The term "Government engineer" as used herein shall mean the State engineer (P.W.A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "engineer inspector" as used herein refers to State engineer inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performances of the work."

2. Restrictions as to Contractors. The Borrower shall receive no bid from any contractor, nor permit any contractor to receive any bid from any subcontractor,

(93) who has not signed U. S. Government Form No. P. W. A. 61, revised March, 1934.

3. Bonds and Insurance. Construction contracts shall be supported by adequate surety or other bonds or security satisfactory to the Administrator for the protection of the Borrower, or materialmen, and of labor employed on the Project or any part thereof. The contractor under any construction contract shall be required to provide public liability insurance in an amount satisfactory to the Administrator.

4. Force Account. All construction work on the Project shall be done under contract, provided, however, that if prices in the bids are excessive, the Borrower reserves the right, anything in this Agreement to the contrary notwithstanding, to apply to the Administrator for permission to do all or any part of the Project on a force account basis.

This Agreement shall be binding upon the parties hereto when a copy thereof, duly executed by the Borrower and the Government, shall have been received by the Borrower. This agreement shall be governed by and be construed in accordance with the laws of the State. If any provision of this Agreement shall be invalid in whole or in part, to the extent it is not invalid it shall be valid and effective and no such invalidity shall affect, in whole or in part, the validity and effectiveness of any other provision of this Agreement or the rights or obligations of the parties hereto, provided, however, that in the opinion of the Administrator, the Agreement does not then violate the terms of the Act; provided, however, that this Agreement shall not be construed so as to create a debt of Greenwood County or so as to in any manner impose a liability upon the general credit of said County or its taxing powers, it being the intention of this Agreement to provide that the payment of the principal of and interest on the bonds and the maintenance and operation of the hydro-electric system shall be paid solely and exclusively from the revenues derived from the operation of the said system herein described, and that the costs of constructing and completing said

(94) system shall be paid exclusively from the proceeds of the bonds and the Grant herein described.

IN WITNESS WHEREOF, the Borrower and the Government have respectively caused this Agreement, to be duly executed as of December 8, 1934.

Signed and approved

E. L. BROOKS,
County Supervisor.

COUNTY OF GREENWOOD, SOUTH CAROLINA
By: E. L. BROOKS,
County Supervisor.

Signed S. A. AGNEW,
County Treasurer.

(Seal)

ATTEST:

E. I. DAVIS, Secretary
Finance Board for Greenwood County.

UNITED STATES OF AMERICA
By HAROLD L. ICKES,
Federal Emergency Administrator
of Public Works.

ANSWER OF GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, AS MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY.

Filed January 17, 1935.

(Style of court and Title omitted.)

The defendants, Greenwood County and The Finance Board for Greenwood County, reserving their rights un-

(95) der a motion to dismiss heretofore filed in this cause, answering the complaint herein aver:

1. That they deny each and every allegation in the complaint not hereinafter specifically admitted.

2. They admit on information and belief that Duke Power Company is a corporation of the State of New Jersey, doing business in the State of South Carolina, and that the Southern Public Utilities Company is a corporation of the State of Maine, doing business in the State of South Carolina.

3. They admit that Greenwood County is a body politic and corporate, located in the Western District of South Carolina, and that the individual defendants compose The Finance Board for Greenwood County, and as such are charged with handling the fiscal affairs of the County.

4. They admit that this suit is civil in its nature between citizens of different states, involves more than Three Thousand Dollars, and that the complaint alleges questions arising under the Constitution and laws of the United States.

5. These defendants admit that the plaintiffs, both taxpayers of the State, are known as the Duke System.

6. These defendants admit that the Duke System, as an electrical utility, is subject to regulation by the State, and that it sells electrical energy in Greenwood, Newberry, and Laurens Counties, but avers, on information and belief, that it has no franchise rights in this territory.

7. These defendants admit that the Duke System has invested money in electrical generation, transmission and distribution facilities. They do not have information sufficient to form a belief as to the number of killowatts available for the Duke System, or as to the mileage of its transmission and distribution lines. These defendants aver, on information and belief, that the plaintiffs are serving a negligible percentage of the possible load

(96) in the Buzzard Roost area, and that one of the primary purposes of the defendant's development is to serve large areas not now served, and which probably never will be served by the plaintiffs, who are interested only in serving populous areas.

8. These defendants admit that Greenwood County proposes to construct and operate on the Saluda River a hydro-electric plant near Buzzard Roost, and to furnish electrical energy therefrom in Greenwood, Newberry and Laurens Counties, to cities, industries and private individuals. These defendants admit the adoption of a certain resolution on October 6, 1934, copy of which is attached to the complaint, but aver that the same has been amended by subsequent resolution, a copy of which is attached to this answer and made a part hereof.

9. These defendants admit that the County has made application to the Federal Power Commission for a license, has caused an estimate to be made of the cost of building the Buzzard Roost Project, which estimate amounts to $2,767,000, and admits that its application to the Federal Power Commission estimates Primary Power of 30,000,000 K.W.H., and Secondary Power 20,000,000 K. W. H. These defendants admit that Greenwood County submitted to the Power Commission a schedule of estimated average rates as shown by Exhibit II, attached to the complaint.

10. These defendants admit that Greenwood County has heretofore made application to the Public Works Administration for a loan and grant of $2,767,000.00 to defray the cost of this project, and that a loan and grant of $2,852,000.00 has been approved by the Public Works Administration.

11. These defendants admit that the County has entered into a loan and grant agreement with the United States of America, under date of December 8, 1934, a certified copy of which has heretofore been filed in this Court and furnished to the plaintiffs. This loan and grant agreement is made a part of this answer and incorporated herein by reference. These defendants ask reference to the agreement for its terms. These defend-

(97) ants deny that the loan and grant agreement imposes any obligation on the County to complete this hydro-electric project from its general funds, or by the use of the taxing power of the County.

12. These defendants have no information as to the truth of the allegations that the Duke System has caused plans and estimates to be made of the Buzzard Roost Project, but these defendants deny, on information and belief, that the construction cost of Buzzard Roost Project will be as much as estimated by the Duke Power Company's engineers, as set out in paragraph XII of the complaint, but aver on information and belief, derived from the estimates of the County's engineers, approved by the engineers of the Public Works Administration, of the War Department, of the Electrical Board of Review, and of the Federal Power Commission, that the entire Buzzard Roost project may be built within the amount of the loan and grant. These defendants deny that their plans call for an unsafe dam. They deny, on information and belief, the correctness of the estimates of the operation expenses made by plaintiffs' engineers as to the amount of power to be produced; but aver, on information and belief, that the estimates of the County's engineers, approved by the engineers of the Public Works Administration of the War Department, of the Electrical Board of Review and of the Federal Power Commission are correct, and that the plans of the County's engineers as to safety have been approved by the same engineers.

13. These defendants admit that The Finance Board of Greenwood County represents them in the Buzzard Roost matter.

14. These defendants admit that the Duke System has been serving some of the proposed customers of the Buzzard Roost project.

15. These defendants aver that Greenwood County proposes to construct the Buzzard Roost project out of the proceeds of the loan and grant to be obtained from the Public Works Administration, and that the County proposes to issue for the portion of the construction fund

(98) not represented by the grant, its revenue bonds payable solely out of the revenues from the developed project, in accordance with the terms and conditions of the Revenue Bond Act of May 8, 1933 (XXXVIII Stat. 411) as amended. These defendants aver that the County will not pledge its general credit nor have recourse to its general funds or involve its taxpayers in pecuniary liability in either the construction or operation of the Buzzard Roost project.

16. These defendants ask reference to the provisions of the Revenue Bond Act of May 8, 1933, for its exact terms.

These defendants admit that Greenwood County has filed with the Federal Power Commission a proposed schedule of average rates which it deems sufficient to operate the project, but specifically aver that under the terms of Act No. 299 of the Acts of 1933 and its amendments, these rates are subject to revision by the County if they are found to be insufficient. These defendants, aver however, on information and belief, that the proposed schedule of rates is sufficient to meet the requirements of the Act.

17. These defendants admit that the County proposes to construct transmission lines outside of Greenwood County, but aver that it has full authority to construct such lines outside of the County and to sell and distribute power outside of the territorial jurisdiction of Greenwood County.

18. On information, advice and belief, these defendants deny that under a proper construction of the National Industrial Recovery Act, Sections 202-203, that it is illegal for the Public Works Administration to make this loan and grant of Greenwood County.

These defendants deny on information, advice and belief, that the National Industrial Recovery Act violates the terms of the United States Constitution or its amendments.

These defendants deny, on information, advice and

(99) belief, that the Duke System has a right to complain of the acts of these defendants.

19. These defendants deny, on information, advice and belief, that any obligation of Greenwood County which it has entered into, or which it proposes to enter into, in connection with the development of the Buzzard Roost project, will constitute bonded indebtedness within the meaning of the South Carolina Constitution, Article X, Sections 5 or 6.

20. These defendants deny, on information, advice and belief, that there is any provision in the National Industrial Recovery Act which prevents the Public Works Administration from lending upon revenue bonds and the security provided by Act No. 299 of the South Carolina Acts of 1933.

These defendants deny on information, advice and belief, that any loan made by the Public Works Administration on the revenue bonds proposed to be issued by Greenwood County will be illegal, and deny that the County or its taxpayers will be generally liable therefor.

21. These defendants admit that the South Carolina Supreme Court has filed its opinion in the case of Park v. Greenwood County, 176 S. E. 870, a copy of which is attached to the complaint. These defendants ask reference to the pleadings and decision in that cause for the issues raised and decided therein. These defendants aver on information, advice and belief that the decision of the South Carolina Supreme Court in the Park case is *res adjudicata* as to all issues raised in this action by the Duke System.

22. These defendants deny that there is any equity under the facts as alleged in the Bill of Complaint, or under the actual facts as set out in this answer.

23. These defendants aver that even if the allegations of the complaint as to the cost of this project, as to its operation expenses and as to the amount of power available are correct, electrical energy may still be sold by these defendants at rates substantially less than the

(100) rates now charged by the Duke System, as shown by the schedules filed by them with the South Carolina Railroad Commission.

24. These defendants aver that their estimates of construction cost, of operation expenses and rates have been approved by the Public Works Administration, by the Electrical Board of Review, and by the Federal Power Commission, and that these estimates prepared by these defendants, so approved, are conclusive as to their correctness so far as judicial review is concerned.

25. These defendants aver that they first proposed to sell a large portion of their power output to the Greenwood Cotton Mills, who are now supplied as to power by their own steam plants; that the plaintiffs herein protested to the Public Works Administration against the selling of such a large block of power at the defendants' low rates to the Greenwood Cotton Mills; that these defendants do not now have any tentative contract to sell power to Greenwood Cotton Mills, but have in lieu of that load made tentative arrangements to sell a considerable amount of power to customers who now purchase from the plaintiffs. These defendants aver that this change of load was due, in part, to the plaintiffs' protest.

These defendants aver that the amount of power which they expect to sell to customers who now purchase from the Duke System amounts only to about two per cent. of the plaintiffs' output in this State; and these defendants aver, on information and belief, that but for the protest of the plaintiffs, they would have probably sold to plaintiffs' present customers an amount equivalent to about three-fourths of one per cent. of the plaintiffs' output in this State.

These defendants aver on information, advice and belief, that any injury and damage which might have occurred to the plaintiffs in the loss of customers is due to their own action in protesting against the original plans of these defendants, and the plaintiffs are estopped thereby from complaining herein.

(101) 26. These defendants aver that the loan and grant to these defendants by the Public Works Administration is a part of a comprehensive program authorized by the Federal Constitution, prepared by the President, for the purposes set out in the statutes, and that this comprehensive program necessarily consists of an aggregate of local projects, and that the financing of this aggregate of local projects as a part of the comprehensive program will provide for the general welfare of these United States.

WHEREFORE having fully answered these defendants ask that this complaint be dismissed.

W. H. NICHOLSON,
R. F. DAVIS,
ROBINSON & ROBINSON,
Attorneys for Greenwood County and The Finance Board of Greenwood County.

January 11th, 1935.

State of South Carolina,
County of Greenwood.

E. L. BROOKS being first duly sworn, says: That he is one of the defendants in the above entitled action; that he has read the foregoing answer, and the same is true of his own knowledge, except as to matters therein stated on information and belief, and those he believes to be true.

E. L. BROOKS.

Sworn to before me this 11th day of January, 1935.

CAMELIA C. MILLER,
Notary Public for S. C. (L. S.)

(102) EXHIBIT ATTACHED TO AND MADE A PART OF THE ORIGINAL ANSWER OF GREENWOOD COUNTY AND ITS FINANCE BOARD FILED JAN. 17, 1935.

A RESOLUTION TO AMEND A RESOLUTION ENTITLED "A RESOLUTION PROVIDING FOR THE ISSUANCE OF TWO MILLION, TWO HUNDRED TWENTY THOUSAND DOLLARS ($2,220,000) REVENUE BONDS OF THE COUNTY OF GREENWOOD, SOUTH CAROLINA, AND FOR THE CONSTRUCTION OF THE HYDRO-ELECTRIC POWER PLANT IN ACCORDANCE WITH THE PROVISIONS OF ACT 299, ACTS OF SOUTH CAROLINA, 1933, AS AMENDED, AND ACT 1095, ACTS OF SOUTH CAROLINA, 1934".

WHEREAS, the Finance Board of Greenwood County, South Carolina, by resolution duly adopted on the ..... day of ....., A. D., 1934, which resolution is duly spread on the minute book of this Board, at page ....., which resolution is entitled "A resolution providing for the issuance of two million, two hundred twenty thousand dollars ($2,200,000) revenue bonds of the County of Greenwood, South Carolina, and for the construction of the hydro-electric power plant in accordance with the provisions of Act 299, Acts of South Carolina, 1933, as amended, and Act 1095, Acts of South Carolina, 1934"; and

WHEREAS the Finance Board of Greenwood County, South Carolina, desires to make certain amendments to said resolution;

NOW, THEREFORE BE IT RESOLVED BY THE FINANCE BOARD OF GREENWOOD COUNTY, SOUTH CAROLINA, AS FOLLOWS:

That the resolution heretofore adopted on the ..... day of ....., 1934, and entitled as above set forth, be and the same is hereby amended as follows:

Section 1. By striking out the form of the bonds and coupons set forth in Section 3 of said resolution and by inserting in lieu thereof the following:

(103) "No. $1,000.00

UNITED STATES OF AMERICA
STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

HYDRO-ELECTRIC POWER REVENUE BOND

The County of Greenwood, State of South Carolina hereby acknowledges itself indebted and for value received promises to pay to the bearer, or if this bond be registered, to the registered holder hereof from the revenue hereinafter described and only therefrom the sum of

ONE THOUSAND DOLLARS ($1,000)

on the first day of October, 19...., and to pay interest on said sum from the date hereof until paid, at the rate of four per cent (4%) per annum, payable semi-annually on the first days of April and October, in each year, upon presentation and surrender of the annexed interest coupons as the same severally mature, both principal and interest being payable in lawful money of the United States of America, at the office of the County Treasurer of Greenwood County, in the City of Greenwood, South Carolina, or, at the option of the holder at the Guaranty Trust Co., in the Borough of Manhattan, City and State of New York.

This bond is one of a series of bonds of like date and tenor except as to maturity, and is issued pursuant to Act No. 299, of the Acts of 1933 of South Carolina, as amended, Act 1095, Acts of 1934 of South Carolina and a resolution duly adopted by the Finance Board of Greenwood County on the 6th day of October, 1934, as amended, for the purpose of defraying the cost of a hydro-electric power system of said County described in said resolution.

Both principal of and interest on this bond are payable solely from a first lien on and pledge of a fixed amount of the gross revenues derived from the operation of the hydro-electric power system of said County as

(104) subsequently improved and extended which amount shall be sufficient at all times to pay the principal of and interest on the bonds when the same shall become due and payable. Neither this bond nor any of the interest coupons hereto attached constitute an indebtedness of said County of Greenwood, within the meaning of any constitutional provision or statutory limitation.

Said County hereby agrees that it will continuously operate said hydro-electric power system and fix and maintain rates for the services furnished by said system as shall be sufficient at all times to provide for the payment of the interest on and principal of this bond and the issue of which it forms a part as and when the same becomes due and payable, to create a "Bond and Interest Redemption Fund" therefor, to provide for the payment of the expenses of the administration and operation and such expenses for maintenance of said system as may be necessary to preserve the same in good repair and working order, to build up a reserve for depreciation of said system and to build up a reserve for improvements, betterments and extensions to said system other than those necessary to maintain the same in good repair and working order; provided that such costs of operating and maintaining the said system shall be payable solely from revenues derived from the operation of the hydro-electric power system.

Under authority of said Act, as amended, and by the resolution authorizing the issuance of this bond, there has been created and granted to and in favor of the holder or holders of this bond and the issue of which it forms a part and to and in favor of the holder or holders of the coupons attached to said bonds a statutory lien, which is hereby recognized as valid and binding on said hydro-electric power system, with the appurtenances and extensions thereto, and said system shall remain subject to said statutory lien until the payment in full of the interest on and the principal of this bond and the issue of which it forms a part.

This bond may be registered as to principal only in the name of the holder on the books of said County in the office of its Treasurer, such registration being noted hereon by the County Treasurer, after which no transfer

(195) shall be valid unless made on said books and similarly noted on the bond, but it may be discharged from such registration by being transferred to bearer, after which it shall be transferable by delivery, but it may be again registered as before. The registration of this bond as to principal shall not restrain the negotiability of the coupons by delivery merely.

The principal of and interest of this bond are exempt from any and all state, county and municipal and other taxation whatsoever under the laws of the State of South Carolina.

It is hereby certified and recited, that all conditions, acts and things required by the constitution or statutes of the State of South Carolina to exist, be performed, and happen precedent to or in the issuance of this bond exist, have been performed and have happened.

IN WITNESS WHEREOF, said County of Greenwood in the State of South Carolina has caused this bond to be signed by its County Supervisor, and the County Treasurer and its corporate seal to be impressed thereon, and countersigned and approved by the County Supervisor and the annexed coupons to be authenticated by the facsimile signature of said County Treasurer and this bond to be dated the first day of October, 1934.

.....
County Supervisor.

.....
County Treasurer.

Countersigned and approved:

.....
County Supervisor.

(FORM OF COUPON)

No. $20.00

On the .... day of ....., 19.., the County of

(106) Greenwood, South Carolina, will pay to the bearer Twenty Dollars ($20.00) at the office of the County Treasurer, Greenwood County, in the City of Greenwood, South Carolina, or at the option of the holder, at the Guaranty Trust Co. in the Borough of Manhattan, City and State of New York from the revenue derived from the operation of the hydro-electric power system described in, and being the semi-annual interest then due on its hydro-electric power revenue bond numbered ....., dated October 1, 1934. This coupon is issued under Act No. 299 of the Acts of 1933 of South Carolina, as amended, Act 1095, Acts of 1934 of South Carolina, and does not constitute an indebtedness of said County within any state constitutional provision or statutory limitation.

.....
County Treasurer.

Section 2. By striking out of said resolution all of the last paragraph of Section 5, and inserting in lieu thereof the following to be known as the last paragraph of Section 5:

"The foregoing rates whenever necessary shall be revised so as to meet the requirements of this resolution and said County hereby covenants and agrees at all times to maintain such rates for services furnished by the system as shall be sufficient to provide for the payment of the interest on and principal of all of said bonds, as and when the same become due and payable, and to create a Bond and Interest Redemption Fund therefor (including a cushion fund to assure the payment of said interest and principal) and to provide for the payment of the expenses of administration and operation and such expenses for maintenance of the system as may be necessary to preserve the same in good repair and working order, and to build up a reserve for depreciation of the system, and to build up a reserve for improvements, betterments and extensions to the system other than those necessary to maintain the same in good repair and working order, as hereinabove provided; provided that the expenses incurred in performing the things authorized in this section shall be payable solely from revenues derived from the operation of the hydro-electric

(107) power system and shall not constitute an indebtedness or obligation of Greenwood County for which the faith and credit of the County may be pledged or taxes levied for the payment thereof";

Section 3. By striking out of said resolution all of Section 9, and inserting in lieu thereof the following to be known as Section 9:

"Section 9. It is covenanted and agreed by the County of Greenwood with the holder, or holders, of the bonds herein authorized to be issued that it will perform all duties with reference to the system required by the constitution and the statutes of South Carolina, and said County hereby irrevocably covenants, binds and obligates itself not to sell, lease or dispose of said system, including any extensions or additions that may be made thereto, until all the bonds issued hereunder shall be paid in full, both principal and interest, or unless and until provisions shall have been made for the payment of said bonds and the interest thereon in full, and the County further covenants and agrees with the holder, or holders, of said bonds to maintain in good condition and to operate said system and to charge and collect such rates and charges for the services rendered by said system, within the limits prescribed by law, so that the income and revenues of the system will be sufficient at all times to meet the requirements as set out in Section 4 hereof; provided that the expenses incurred in performing the things authorized in this section shall be payable solely from revenues derived from the operation of the hydro-electric power system and shall not constitute an indebtedness or obligation of Greenwood County for which the faith and credit of the County may be pledged or taxes levied for the payment thereof."

Section 4: By striking out of said resolution all of paragraph 1 of Section 10 and inserting in lieu thereof the following to be known as Paragraph 1, Section 10:

"For the further protection of the holders of the bonds herein authorized to be issued and the coupons thereto attached, a statutory lien upon said system is hereby granted and created as provided in Section 8 of said Act No. 299, as amended, which statutory lien is

(108) hereby recognized as valid and binding upon said system, and shall take effect immediately upon the delivery of any bond authorized to be issued under the provisions of this resolution, and any holder of said bonds or any of the coupons may, either in law or in equity, by suit, action, mandamus or other proceedings, protect the statutory lien hereby conferred, and may by suit, action, mandamus or other proceedings, enforce and compel the performance of all duties required by said act as amended, including the making and collecting of sufficient rates, segregating of the income and revenues and the application thereof";

Section 5. By striking out of said resolution all of Sections 14, 15 and 16 and inserting in lieu thereof the following sections to be known as Sections 14, 15, 16 and 17 of said resolution: —

"Section 14. That none of the acts, conditions or covenants or things authorized to be done, kept or performed in this resolution or any section herein, shall be construed as authorizing Greenwood County to create a debt or incur any liability which would in any manner impose a charge against the general credit of said County or its taxing powers, it being the intention of this resolution to provide that the payment of the principal of and interest on the bonds herein authorized and the maintenance and operation of the hydro-electric system shall be paid solely and exclusively from the revenues derived from the operation of said system herein described and that the cost of constructing and completing said system shall be paid exclusively from the proceeds of the bonds herein described, and from the Grant made by the Government";

"Section 15. If any section, paragraph, clause or provisions of this resolution shall be held invalid, the invalidity of such section, paragraph, clause or provision shall not affect any of the remaining provisions of this resolution";

"Section 16. All ordinances, resolutions and orders or parts thereof in conflict with the provisions of this resolution are to the extent of such conflict, hereby repealed";

(109) "Section 17. This resolution shall take effect immediately upon its passage."

Section 6. That the above resolution shall remain in full force and effect in all other respects except as herein amended.

AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT.

Filed February 4, 1935.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County, E. L. Brooks, S. A. Agnew, and E. I. Davis, as members of and constituting the Finance Board for Greenwood County, and Harold L. Ickes as Federal Emergency Administrator of Public Works, Defendants.

The plaintiffs, leave having been granted them by this Honorable Court, file this supplement and amendment to their original bill of complaint, and allege:

I.

Since the institution of this suit Harold L. Ickes, as Federal Emergency Administrator of Public Works, on his own application filed herein on December 3, 1934, and by order duly made and entered herein December 4, 1934, has become a party defendant to this suit, and has filed an answer to the original bill of complaint, said answer having been filed with the Clerk of this Court on January 17, 1935.

(110)

II.

After the institution of this suit said Administrator revised and changed said agreement, and caused the resolution providing for the issuance of said bonds to be revised and changed by the Finance Board for Greenwood County, a copy of the revised agreement as executed being attached to the answer of said Administrator marked Exhibit "A", and a copy of the revised resolution adopted by said Finance Board, under which it now proposes to issue bonds to the United States of America, being attached to and made a part of the answer of the defendant Greenwood County, and the members of its Finance Board.

III.

The plaintiffs are informed, advised and believe, and therefore allege and charge, that the use and appropriation of federal funds for the construction of said Buzzard Roost project as proposed and provided for in said revised agreement (Exhibit "A" to the Answer of Administrator Ickes), will be in violation of the provisions of the National Industrial Recovery Act, even if said Act could be interpreted and construed as authorizing under any circumstances or conditions, and upon any terms the use of federal funds for such purpose, and will be in violation of the rules and regulations prescribed by the President to carry out the purposes of Title II of said Act, to which rules and regulations as set forth in Circular No. 1, issued by the Federal Emergency Administration of Public Works, July 31, 1933, reference is hereby made, for the reasons and in the respects set forth in the original bill of complaint, as well as for that (a) the bonds to be issued to the United States under said revised resolution pursuant to said revised agreement will not be legally enforceable, and will not be sufficient to reimburse the United States for its outlay (less the grant of 30 per centum of the cost of the labor and material employed upon said project), for the construction of said project, and, in view of the facts hereinbefore alleged in the original bill of complaint as to the cost of constructing said project, its power output, its revenues and operating expenses, the United

(111) States will have no security whatsoever for the repayment of said outlay in excess of said grant; (b) under said revised agreement Greenwood County does not obligate itself to complete said project, or to maintain and operate the same if it should be completed; (c) as heretofore alleged in the original bill of complaint said project cannot be constructed for the amount of said federal funds, and if constructed will not be self-supporting, and Greenwood County has no other funds available to it which it can lawfully use for the construction of said project, or for the maintenance and operation thereof if the same should be constructed; (d) said Buzzard Roost project is not a part of and has no relation to any comprehensive program of public works, or coordinated plan designed and intended to promote the general welfare of the United States or to carry out the policy of Congress as declared in said National Industrial Recovery Act; and (e) the use and appropriation of federal funds for the construction of said project will not promote the general welfare of the United States, or carry out the policy of Congress as declared in said Act, and is not authorized by said Act.

IV.

The plaintiffs are informed, advised and believe, and therefore allege:

(1) That the National Industrial Recovery Act does not purport to confer on the Administrator, the Federal Emergency Administration of Public Works, the President, or any other officer or agency designated to act for the President or charged with the administration of said Act, uncontrolled and unlimited legislative power to make appropriations of federal funds to such objects and for such purposes as any such officer or agency may deem to be in the interest or for the general welfare; that if said National Industrial Recovery Act should be interpreted and construed as authorizing the use of federal funds for the construction of said Buzzard Roost project under any circumstances or conditions there has, in this case, been no finding by the Administrator, the Federal Emergency Administration of Public Works, the President, or by any other officer or agency designated to act for the President or charged with the administration of said Act that the proposed appropriation will

(112) comply with the terms of said Act by increasing employment quickly, that the part of said appropriation designated as a loan will be reasonably secured within the terms of said Act, or that said appropriation will otherwise carry out or promote the policy of Congress as declared in said Act; that the rules and regulations prescribed by the President to carry out the purposes of Title II of said Act, as contained in Circular No. 1 hereinbefore referred to, prescribe among the tests for the eligibility of a project that it shall be sound from an engineering and technical standpoint, that the applicant for a loan and grant of federal funds shall have financial ability to complete the project and to reasonably secure any loan made by the United States; and that the securities to be purchased by the United States shall be legally enforceable; and further prescribe that no grant will be allowed unless the applicant enters into a contract to complete the project; that it was the purpose of this circular to require an investigation of these questions and a favorable finding on them as a condition of the eligibilty of a project for a loan and grant of federal funds, and plaintiffs charge that no such findings have been made in favor of said Buzzard Roost project, and that in fact said project is not sound from and engineering and technical standpoint, that the County is not financially able to complete said project, that it cannot secure the socalled loan proposed to be made by the United States, that the securities proposed to be purchased by the United States will not be legally enforceable as against the County, and that the agreement executed between the County and the Administrator on behalf of the United States (Exhibit "A" of the answer of the Administrator) undertakes to relieve the County from any obligation to complete said project or to maintain and operate the same if it should be completed; and that therefore the appropriation of federal funds to Greenwood County for the construction of said Buzzard Roost project as proposed and provided for by said agreement (Exhibit "A" of the answer of the Administrator or) is unauthorized and illegal.

(2) That if said National Industrial Recovery Act purports to authorize the use and appropriation of federal funds proposed to be made in this case for the construction of said Buzzard Roost project, said Act con-

(113) stitutes an unlawful delegation of the legislative power of Congress, in violation of Article I, Sec. 1, and Sec. 8, Paragraph 18, of the U. S. Constitution.

V.

As heretofore alleged in the original bill of complaint plaintiffs are electrical public utility corporations engaged in the intrastate sale and distribution of electric power and energy within the State of South Carolina; their business and their rates for such sales are subject to the exclusive jurisdiction, regulation and control of the Railroad Commission of said State; they have invested many millions of dollars in electric power facilities for serving the territory in question, and are adequately serving said territory; and their rates are just and reasonable and have been duly approved by said Railroad Commission.

VI.

Plaintiffs are informed, advised and believe, and therefore allege and charge:

(1) That the effect of said appropriation of federal funds for the construction of said Buzzard Roost project is to regulate and control the intrastate rates of these plaintiffs for the sale and distribution of electric power within the State of South Carolina; that in order to bring about said effect the Administrator, unless restrained by this Honorable Court, intends by the use of said federal funds to construct, or cause to be constructed, under his direction and supervision said Buzzard Roost project, so that the rates to be charged for power which would be produced by said project shall be used as a standard or yardstick to measure and limit and to force a reduction of the rates of these plaintiffs; that also in order to bring about said effect the defendants Greenwood County and the members of its Finance Board, have fixed the rates stated in Exhibits "I" and "II" to the original bill of complaint for the sale of power produced by said project notwithstanding the fact, as heretofore alleged in the original bill of complaint, that at said rates said project will not be self-liquidating and self-supporting; that as showing the effect of said appropriation of

(114) federal funds plaintiffs attach hereto as Exhibit "XII" and make a part hereof, Release No. 989, issued by the Federal Emergency Administration of Public Works on or about September 27, 1934; that the appropriation of federal funds for said purpose is not authorized by the National Industrial Recovery Act, and if said Act should be interpreted and construed as authorizing said appropriation of federal funds for said purpose it is in violation of the 10th Amendment of the U. S. Constitution.

(2) That said Buzzard Roost project could not be constructed and operated in competition with these plaintiffs so as to deprive them of their customers and business but for said unauthorized and illegal use of federal funds, and the injury which the plaintiffs will sustain to their property and business, if said project is constructed as proposed by defendants, will be directly caused and brought about by such unauthorized and illegal use of federal funds.

(3) That the proposed appropriation of federal funds to Greenwood County under the terms of said revised agreement (Exhibit "A" to the answer of the Administrator"), as hereinbefore alleged, would, for the reasons hereinbefore alleged and alleged in the original bill of complaint, be illegal, and would render the defendant Greenwood County and its taxpayers liable to the Federal Government for the repayment of said funds, with legal interest thereon, at such time as the Federal Government should elect to require the repayment of said funds, irrespective of the maturity or maturities of the bonds proposed to be issued under said amended resolution of the Finance Board of said County and the receipt and acceptance of said County of said federal funds would create a general liability upon said County and its taxpayers, and constitute an indebtedness against said County, which together with the existing bonded indebtedness of said County would amount to more indebtedness in the aggregate than 8 per centum of the value of all taxable property within said County as valued for state taxation, and would therefore be contrary to and in violation of Article X, Secs. 5 and 6, of the Constitution of South Carolina.

(115) WHEREFORE the plaintiffs having filed the foregoing as a supplement and amendment to their original bill of complaint, renew their prayer for relief as set forth in said original bill of complaint, and do further pray that said relief be granted against the defendant Harold L. Ickes, as Federal Emergency Administrator of Public Works, as well as against the original defendants.

H. J. HAYNSWORTH,
W. R. PERKINS,
J. H. MARION,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs.

MOTION TO DISMISS.

Filed February 23, 1935.

(Style of Court and Title omitted.)

The Defendants Greenwood County, E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting the Finance Board of Greenwood County, will move the Court at 11:00 o'clock A. M., on the 2nd day of March, 1935, at Chambers, in Anderson, S. C., or as soon thereafter as counsel can be heard, to dismiss the bill of complaint as amended and supplemented under order of the 2nd day of February, 1935, upon the following grounds:

1. Because it appears in the bill of complaint as amended and supplemented that a proceeding entitled R. H. Park, in his own right and as a citizen and taxpayer of Greenwood County, and in behalf of other persons similarly situated v. Greenwood County, et al., has heretofore been instituted in the original jurisdiction of the South Carolina Supreme Court, and has been decided against the taxpayer in that action, therefore the questions attempted to be raised by the plaintiffs in this action are *res adjudicata*.

2. In that the complaint as amended and supple-

(116) mented shows upon its face that there is an insufficiency of fact to constitute a valid cause of action in equity against these defendants.

3. In that the complaint as amended and supplemented shows upon its face that the plaintiffs have no standing in Court to question the action of the defendants in the particulars set out in the bill and in the supplemental bill.

W. H. NICHOLSON,
R. F. DAVIS,
ROBINSON & ROBINSON,
Attorneys for Greenwood County and its Finance Board.

February 19, 1935.

MOTION TO DISMISS.

Filed April 9, 1935.

(Style of Court and Title omitted.)

Now comes Harold L. Ickes, as Federal Emergency Administrator of Public Works, joined as defendant herein by order of the Court dated December 4, 1934, and moves the court to dismiss the Bill of Complaint as amended and supplemented under order of February 2, 1935, upon the ground that the Bill of Complaint as so amended and supplemented does not state any matter of equity entitling the plaintiffs to the relief prayed for, nor are the facts as stated sufficient to entitle the plaintiffs to any relief against the defendants.

WHEREFORE this defendant prays that the whole of said Bill of Complaint as so amended and supplemented may be dismissed.

HENRY T. HUNT,
As Special Assistant to the Attorney General, Attorney for Harold L. Ickes as Federal Emergency Administrator of Public Works.

(117)

OPINION.

Filed April 23, 1935.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.
EQUITY 451.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

I. OUTLINE OF PROCEEDING.

This matter comes before the Court upon motions on behalf of all the defendants to dismiss the original bill, as modified and amended by plaintiffs' supplemental bill. The separate motion of Harold L. Ickes, as Federal Emergency Administrator of Public Works, is based upon the ground that the bill, as amended, "does not state any matter of equity entitling the plaintiffs to the relief prayed for, nor are the facts as stated sufficient to entitle the plaintiffs to any relief against the defendants". The motion filed on behalf of all other defendants is based upon three grounds:

"1. Because it appears in the bill of complaint as amended and supplemented that a proceeding entitled R. H. Park, in his own right and as a citizen and taxpayer of Greenwood County, and in behalf of other persons similarly situated v. Greenwood County, et al., has heretofore been instituted in the original jurisdiction of the South Carolina Supreme Court, and has been decided against the taxpayer in that action; therefore the ques-

(118) tions attempted to be raised by the plaintiffs in this action are *res adjudicata.*

2. In that the complaint as amended and supplemented shows upon its face that there is an insufficiency of fact to constitute a valid cause of action in equity against these defendants.

3. In that the complaint as amended and supplemented shows upon its face that the plaintiffs have no standing in Court to question the action of the defendants in the particulars set out in the bill and in the supplemental bill."

The last mentioned motion was filed February 23, 1935; that of Mr. Ickes, as Federal Emergency Administrator of Public Works, on April 9, 1935. The final brief of counsel upon these motions reached me on April 9, 1935. The purpose set out in the bill is to enjoin the defendants from doing certain acts complained of as illegal and unconstitutional, all of which will fully appear by reference to the pleadings, and will be more specifically detailed later on in this opinion. The Federal Emergency Administrator of Public Works was not made a party to the original bill, but upon his petition, concurred in by the other defendants, an order was passed allowing him to intervene and requiring that he be made a party defendant. Thereupon, the defendants submitted a motion to require the plaintiffs to amend the complaint by setting out the contract finally executed by and between the defendants, in lieu of the contract alleged in the complaint. This motion was refused, for the reason that the plaintiffs had used every effort to ascertain the terms of the contract, which had not then been signed, and, being advised by the defendants, who readily furnished the information, of what was then proposed, set out in the bill as an exhibit thereto the terms of the then proposed contract. Subsequently, the defendants made certain changes in the proposed contract, and advised the plaintiffs thereof, notwithstanding which the actual signing of the contract had not taken place, nor had the plaintiffs been advised of the changes proposed when the bill was filed, nor up to the time that the motion was filed. The defendants then an-

(119) swered, setting up the contract, which had been duly signed at the time of the filing of the answers, and filed motions to dismiss on the same substantial grounds as here presented. Following what the Court conceived to be the proper practice, as indicated by the Supreme Court in Borden's Company v. Baldwin, 293 U. S. 194, the Court refused the motions to dismiss. Thereafter, the plaintiffs were permitted to file their amended and supplemental bill, and after all the answers were in, the motions to dismiss, above outlined, were filed, and, at the arguments thereon, it was agreed that the Court should proceed with the hearing and render its decree based upon the truth of the facts alleged in the bill, which, for the purposes of the motions to dismiss, must be admitted. It was expressly understood, however, that the contract between the defendants, as finally signed, must be accepted as the true contract, in lieu of that originally alleged in the bill. In passing, it should be stated that it appeared to be first contemplated that certain testimony would be taken, but, as stated above, it was finally decided by both sides that this would be dispensed with.

II. FINDINGS OF FACT.

By way of preface to these findings, the Court thinks it proper to state that, upon the determinative issues involved, as it views the case, there are but few, if any substantial, issues of fact disclosed by the pleadings, and counsel for both sides have shown a commendable spirit of cooperation in their agreement by which the case may be brought to an early conclusion. Since the motions under consideration admit the truth of all the allegations of fact contained in the bill, and are, of course, part of the record, and, since it would too greatly prolong this opinion here to quote them in full, I think it only necessary here to find that the allegations of fact, as contradistinguished from conclusions of law, set out in the bill are true. To clarify the opinion, however, and for the convenience of the appellate courts which may subsequently be called upon to review this opinion, I will briefly summarize certain of the findings upon which my conclusions must and do rest, as follows:

(120) 1. The plaintiffs are electrical public utilities corporations, engaged in the intrastate sale and distribution of electric power and energy within the State of South Carolina; their business and their rates for such sales are subject to the exclusive jurisdiction, regulation and control of the Railroad Commission of said State; they have invested many millions of dollars in electric power facilities for the purpose of serving the territory in which the defendant, Greenwood County, intends, through its proposed Buzzard Roost project, to engage in the generation, distribution and sale of electric power in competition with the plaintiffs. The plaintiffs are adequately serving this territory and their established and available facilities are amply sufficient so to serve said territory for many years; their rates are just and reasonable and have been duly approved by said Railroad Commission; and they have heretofore secured and now own and use, for the purpose of conducting their business in said territory, valuable franchises and operating rights. Attention will be hereafter called to the provisions of the South Carolina statutes, imposing upon the plaintiffs numerous obligations, such as continued maintenance of service, enlargement of facilities, taxation, adherence to rates fixed by the Commission, and other duties, to many of which burdens the law does not subject Greenwood County. The bill of complaint adequately alleges the property rights of the plaintiffs, for the protection of which injunctive relief is sought in this suit.

2. The Federal Emergency Administrator of Public Works has entered into an agreement with his co-defendants, dated December 8, 1934, for the construction, on the Saluda River, in the State of South Carolina, at a point known as Buzzard Roost, of a hydro-electric plant, together with transmission and distribution lines extending into and through the Counties of Greenwood, Newberry and Laurens, for the purpose of engaging in the business of furnishing electrical energy to municipalities, industrial enterprises, private individuals, and the public generally, for domestic, commercial and industrial uses. The principal customers with whom the County has entered into contracts, and with whom it proposes to enter into contracts, for the sale of elec-

(121) trical energy to be produced by said plant, are now, and for a number of years have been, customers of the plaintiffs.

3. It is proposed to construct the plant under the supervision and direction of the Administrator, under an agreement by which he purports to be acting under Title II of the National Industrial Recovery Act. The contract provides for a loan and grant by the Administrator to his co-defendant County in an aggregate sum not to exceed $2,852,000.00. The grant will amount to thirty per centum of the cost of the labor and materials employed upon said project, and the loan will be represented by bonds to be issued by the County to the United States of America, both principal and interest of said bonds to be payable only out of the revenues of the plant. The contract specifically provides that the principal and interest on the bonds, and the maintenance and operation of the hydro-electric system, shall be paid solely and exclusively from the operation of said system, and that the cost of constructing and completing the system shall be paid exclusively from the proceeds of the bonds and the grant described in the contract.

4. It appears from the bill that the County has estimated, through its engineers, that the cost of the completion of the project will come within the limits of the amount to be furnished through the loan and grant, and that the County has set rates for the sale of power based upon these estimates, but that the project will actually cost an excess of more than one million dollars beyond the County's estimate; that the project will not be self-liquidating and self-supporting; and that, therefore, the rates fixed by the County in the contract with the Administrator will not meet the requirements of the State statutes under which it is proposed to construct and operate the plant.

5. The proposed rates of the defendants are substantially below the rates of the plaintiffs for serving the same territory, which rates of the plaintiffs have been approved by the Railroad Commission of the State of South Carolina, and it is on account of these lower rates that the defendants have been able to make contracts

(122) for the sale of the power which would be produced by said Buzzard Roost project with those who heretofore, and for a number of years, have been customers of the plaintiffs. If said project should be constructed by the defendants and put into operation, the plaintiffs, because of said lower rates, will be deprived of their customers in the territory in which said project would operate, and the business and property of the plaintiffs would be seriously and permanently injured.

6. The declared policy of the Federal Emergency Administrator of Public Works, as set out in Release No. 989, issued in August, 1934, a copy of which is attached to and made part of the amended bill of complaint, is that, in making appropriations of federal funds to municipally owned power projects, such as the Buzzard Roost, the enterprise so aided shall sell power at rates substantially below the rates of any privately owned electrical utility with which the municipality owned project will compete, thereby, in effect, constituting the rates of the municipally owned project a yardstick to regulate and bring about a reduction of the rates of the privately owned utility.

7. The rates for the sale of power to be produced by said Buzzard Roost project were fixed by Greenwood County, subject to the approval of the Administrator, under the terms of the loan and grant agreement entered into December 8, 1934, providing that, as a condition of the loan and grant, the County should "adopt a resolution satisfactory in form and substance to the Administrator providing for rates to be charged for services afforded by the hydro-electric system."

8. The Buzzard Roost project is a purely intrastate enterprise. The County does not propose, nor is it empowered, to engage in an interstate business.

9. It is proposed by the defendants to construct the enterprise in question solely through funds furnished by the Federal Emergency Administrator of Public Works, and the facts alleged indicate conclusively to the mind of the Court that it is not in contemplation of development through any other source. The possibility of such

(123) method of financing, if such possibility exists (which appears extremely doubtful), is not here under consideration. We are to deal with the case presented and with that case alone.

10. It is shown by its application filed with the Federal power Commission that the purpose of the County is to conduct a proprietary business by which it is proposed to sell by far the greater portion of its output to business enterprises generally outside of the County of Greenwood, and to furnish the smaller fraction thereof to customers in Greenwood County, the greater portion of which fraction it has contracted to sell, or proposes to enter into contracts to sell, to textile corporations. Counsel for the County in argument conceded that the largest of such contracts referred to in its application to the said Power Commission has already been abandoned. I, therefore, find that the County's proposed enterprise is not primarily for the purpose of establishing a utility to supply the needs of the County, but that it is proposed to do a general proprietary utilities business, both within and without the County, in competition with the plaintiffs.

11. By way of preface to the statement of my conclusions of law, attention is here directed to certain applicable provisions of South Carolina statutes. Among the duties imposed upon the plaintiffs by Act No. 871, approved April 8, 1932, and amendments thereto, are the following: The rates shall be just and reasonable and approved by the Railroad Commission; adequate, efficient and reasonable service must be furnished; no rate greater or less than that prescribed by the schedules so adopted shall be received or accepted; no unreasonable preference or advantage in rates or services shall be extended to any person, corporation or municipality; the rates are at all times subject to modification, change or annulment by the Commission as the public interest may require; the Commission may require the plaintiffs to establish, construct, maintain and operate any reasonable extensions of their existing facilities; the plaintiffs may not, without permission of the Commission, abandon all or any portion of their service to the public, except for non-payment of undisputed charges; every

(124) requirement, decision, rule or regulation of the Commission must be complied with. In Act No. 902, approved April 12, 1934, it is provided that all provisions of that Act, and all prior Acts, repugnant to or inconsistent with the provisions of the Public Works Administration Act of the Congress of the United States, are declared void in so far as the same are in conflict with said Act of Congress, it being declared to be the intention of Act No. 902 to enable counties, etc., to qualify for securing the loan from the Public Works Administration of the Federal Government. By Act No. 1095, approved April 12, 1934, Greenwood County, through its Finance Board, is authorized to procure a loan from the Public Works Administration for the purpose of constructing the plant in question, and, as a self-liquidating project, to issue bonds to secure the same.

12. If, and in so far as, it may be necessary for the purposes of this opinion to consider other facts established by the bill, they will be appropriately hereinafter referred to.

III. CONCLUSIONS OF LAW.

1. Plea of *Res Adjudicata.* The bill sets out in detail the proceedings brought in the original jurisdiction of the Supreme Court of South Carolina for the purpose of testing the constitutionality of the right of the County to procure the loan in question, and to establish with the proceeds thereof the proposed Buzzard Roost plant. That was an application for an injunction upon the part of Dr. R. H. Park, in his own right as a citizen and taxpayer of Greenwood County, and in behalf of other persons similarly situated. The County itself, its County Supervisor, its County Treasurer, and another of its citizens, constituting its Finance Board, were made parties defendant. After the pleadings were filed, the Duke Power Company and the Southern Public Utilities Company, alleging their status as large property holders and taxpayers, and as holders of valuable franchises, filed a petition to be allowed to interplead. To this petition, all parties to the cause, plaintiff and defendants, objected, and the petition was denied by the Supreme

(125) Court, which, however, gave permission to petitioners to participate in the argument of the case as presented by the pleadings then before the Court. Petitioners, however, declined to avail themselves of this privilege. The suit thus brought was a friendly one, and, as stated by the Supreme Court, Park v. Greenwood County, 174 S. C. 35, 176 S. E. 870, three issues were presented for determination, namely:

"(1) May the Legislature permit or authorize a county to construct and operate a hydro-electric plant for the uses referred to above?

(2) Do the revenue bonds issued, or here sought to be issued, pursuant to the Act of May 8, 1933, constitute debts within the limitations of section 7 of article 8 and sections 5 and 6 of article 10 of the Constitution?

(3) Does the proposed ordinance, submitted as an exhibit to the pleadings, comply with the provisions of the Act of May 8, 1933?"

The decision of the Court was upon these three issues alone, and all of the questions were answered in the affirmative. The uses and purposes referred to in Question No. 1 were stated by the Court, as follows:

"It appears that Greenwood County has made application to the Public Works Administration, under the provisions of the Revenue Bond Act of May 8, 1933 (38 Stat. at Large, p. 411), as amended, for a loan to be used in the erection of a hydro-electric plant at "Buzzard Roost" on the Saluda River; the electrical energy generated to be sold by the county to cities, towns, corporations, and individuals within and without its territorial limits."

Plaintiffs herein, in order to intervene, and as a basis of their right to intervene, not only raised substantially the questions decided by the Supreme Court, but also (Par. 7, et seq.), set up, among other additional issues, their status as owners of valuable franchises, their compliance with all rules and regulations of regulatory authorities, the large expenditures which they have made

(126) in establishing their plants in this State, through which they had given employment to many thousands of people, and the resultant danger of depriving them of a large part, if not the whole, of their business in Greenwood County and adjoining counties by means of unlawful competition. They also, (Par. 9), alleged that neither the complaint nor the return and answer in said suit raised all the issues of fact or of law upon which the sound and just judicial determination of the validity of the acts and proceedings of the defendants with respect to said power project depended, and that there had not been invoked all applicable provisions of the State and Federal law, nor the applicable provisions of the State and Federal Constitutions, either expressly or impliedly. Therefore, the petitioners for intervention in that cause, as plaintiffs here, clearly cannot be held to be concluded by the decision in that case from now asserting any of the new issues herein presented. The concrete rights asserted by the plaintiffs in the instant case to be protected against unfair and illegal competition, and their right to invoke the provisions of the Federal Constitution herein asserted, were left out of the question entirely. No question was made, or permitted to be made, of their status and obligations as holders of public utilities franchises, nor of the nature of the contracts proposed to be entered into with customers and with the Public Works Administration, including the method of fixing rates, nor of numerous other questions here involved. I hold that the decision of the Supreme Court of South Carolina is controlling to the extent, and to the extent only, of the issues decided in the State case, but that the plea of res adjudicata must be overruled and dismissed because of other issues herein presented and undetermined by that decision, especially since neither were the plaintiffs parties, nor was the defendant Administrator party, to that cause.

2. Compliance with the terms of the Public Works Administration Act. (Title II, N. I. R. A.) The plaintiffs have laid considerable stress upon the contention that the proposed contract is ultra vires, because it is violative of and not in compliance with the terms of the Act, nor of the comprehensive program adopted by the President for the Administration of Public Works Ad-

(127) ministration funds, and for the reason that the credit of the County is not pledged to secure the payment of the bonds, and there is no sufficient guaranty on the part of the County that the project will be completed. The contention that the proposed contract is ultra vires, because the credit of the County is not pledged to secure the payment of the bonds, is, I think, without merit. Unquestionably, a large discretion is vested in the Administrator, with which the Courts may not interfere, especially unless there is such abuse of that discretion as to justify intervention. Furthermore, the Act itself, providing for the appointment of the Administrator, and the laws of the State, specifically make provision for self-liquidating projects of the character here proposed. The suggestion of the absence of compliance with the Statute by failure to adopt a sufficient comprehensive program is also without merit. The contention, however, that the contract is ultra vires, because violative and not in compliance with the terms of the Act, nor of the comprehensive program adopted by the President, and that there is no sufficient guaranty on the part of the County that the project will be completed, presents another question.

Significant among the provisions of the Act, Section 203 (d), is the authorization of the President to extend the benefits of the Act "to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county or municipality to borrow money or incur indebtedness". The Act thus empowers the President to aid such state, county or municipality in the performance of an unconstitutional act, irrespective of the injury that may result to taxpayers or their businesses. Significant, also, in the rules prescribed by the President, Circular No. 1, July 31, 1933, is the provision, Section 8, Page 8, that among the projects to be preferred as to the grant shall be included "projects for the transmission of electrical energy into territories not now served", and that "the grant will not be allowed unless the public body either (a) has power to sell to the United States its bonds in sufficient amount to reimburse the United States for its outlay (less the grant if allowed) in connection with the project and enters into

(128) a contract so to do and to complete the project, or (b) has power to convey the site of the project to the United States and contracts so to do, and to pay rental sufficient to reimburse the United States for its outlay less the grant if allowed, and to complete the project, or (c) is in process of securing the necessary powers and the Administrator is convinced that such powers will be obtained, or (d) in special cases as the President may determine." The first of the provisions above-referred to clearly indicates that it was not intended to aid by grant the establishment of projects for the transmission of electrical energy into territories which, as here, are now adequately and fairly served at reasonable rates, and that, in proposing to do so in the instant case, the Administrator is not complying with the terms of the comprehensive program. Furthermore, the latter provision referred to is a specific limitation upon the authority of the Administrator to extend the grant in any case where a county fails to enter into a contract to complete the project, or to convey the site of the project, and contracts to do so, and to pay rental sufficient to reimburse the United States for its outlay, or is in process of securing these powers so as to convince the Administrator that they will be obtained, or in special cases as the President may determine. Certainly there is no indication here that the President has made a determination in this special case. The contract entered into, in pursuance of this program, limits the application of the funds derived from the grant and the bonds to the *construction* of the plant, and does not extend it to the *purchase* of the site. Taken in connection with the rules prescribed in this Circular, which requires the County itself to provide for preliminary expenses and the showing of title to the site of the plant, we are of opinion that it was not intended to confer upon the Administrator the right to allocate funds, either by loan or grant, for purposes other than construction. To do so would be ultra vires upon the part of the Administrator, and not only would the County be charged by the terms of the contract with the payment of whatever expenses should be required to procure the authorization and issuance of the bonds, but also for the acquisition of the site of the plant out of its general funds, with the result that the plaintiffs, as taxpayers, would be required to contribute

(129) thereto. We find nothing in the Act, nor in the rules prescribed by the President, nor in the contract, to authorize or require the application of Public Works Administration funds for this purpose. Let it be borne in mind, as above stated, that what the County proposes to do is not in the exercise of ordinary governmental functions, but is to establish a proprietary business; that the situation of the County differs from that ordinarily occupied by cities and towns already in control of the streets and other properties necessary for the enlargement or construction of municipal lighting plants. In this connection, let it be further remembered that the motion admits the allegations of the bill that the loan and grant combined are insufficient to provide for the completion of the project, and that the estimated revenues are insufficient to make the project self-liquidating, and thereby "reasonably secure" the payment of the loan.

3. Unlawful delegation of legislative powers by the Act. Properly construed, if the Act be held to be constitutional, there is no unlawful delegation of legislative powers therein, and the decision in the case of Panama Refining Co. v. Ryan, 293 U. S. 388, is not applicable. I do not think, however, that the Act delegates, nor was intended to delegate, to the President, nor to the Public Works Administration, any power to regulate the rates of utilities companies. That power, where it exists in matters affecting interstate commerce, is delegated to other bodies, and the assumption of that power to accomplish the declared purpose of the Public Works Administration to force utilities companies to lower their rates, without regard to their ability to do so, or consequent confiscatory results, would be ultra vires and not within the terms of the Act. The decision, however, should rest upon result rather than purpose, which is always presumed as the natural consequence of an act.

4. Plaintiffs' right to maintain the suit. A number of cases have recently been decided by the lower courts involving this and other questions here presented. These decisions are not in harmony, and it would too greatly prolong this opinion to review them in detail. The

(130) Supreme Court has definitely decided that one's mere status as a federal taxpayer presents no justiciable controversy, and confers no right to challenge the constitutionality of an act of Congress. To authorize such challenge in a court of equity, it is necessary that the complainant, because of the exercise of an unconstitutional act authorized by Congress, shall have suffered, or be threatened with subjection to, some special injury, differing in character and degree from that suffered in common with other taxpayers, Massachusetts v. Mellon, Frothingham v. Mellon, 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078. It was held in these cases, quoting from Cherokee Nation v. Georgia, 5 Pet. 1, 75, that "it is only where the rights of persons or property are involved, and when such rights can be presented under some judicial form of proceedings, that courts of justice can interpose relief. This court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation, upon rights properly falling under judicial cognizance, or a remedy is not to be had here." At Page 488, further discussing the Frothingham case, the Court said: "We are not now speaking of the merely ministerial duties of officials. Gaines v. Thompson, 7 Wall. 347. We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." The last quoted case furnishes an interesting discussion in which is clearly outlined the difference between merely ministerial acts, which the court may review, and acts done in the exercise of official discretion, which the court is powerless to review. It is significant, however, that one of the justifications of this decision, and others previously rendered, was the negligible amount of tax exacted from its citizens by the Federal Government. The decision antedated recent enactments of Congress providing for appropriations reaching into many millions of dollars per year in amounts so vast as to stagger the imagination. Certainly it cannot now be said that these taxes are negligible, especially where the taxpayers, as in the case of public utilities companies, operating under state or federal

(131) franchises, and, therefore, subjected to special burdens, must pay out of their revenues large amounts by way of income or privilege taxes. Furthermore, the plaintiffs here do not base their rights upon their status as federal taxpayers, but as taxpayers of the State of South Carolina and of the counties in which the enterprise sought to be enjoined is to be established, and although a self-liquidating project, the contract requires of the County certain outside expenditures to which the plaintiffs, as taxpayers, must contribute. As such, their right to maintain an action to challenge the constitutionality of a state statute has long been an established principle in South Carolina, in the states generally, and in federal courts vested with jurisdiction. I fail to discover any valid reason why, by the same principle, a federal court should be denied the right to pass upon the constitutionality of an act of Congress which results, in its last analysis, in the exaction of a tax payable to the state. As stated above, however, the plaintiffs not only ground their claim upon their status as taxpayers of the State, but also on the ground that, as holders of valuable franchises, they are subjected to unfair and illegal competition. I think, therefore, that the case, in that respect, comes squarely under the decision in Frost v. Corporation Commission, 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483. The appellant in that case owned a cotton ginning business, which he operated under a permit from the State Corporation Commission of Oklahoma. Under a statute, originally passed in 1915, and amended from time to time, cotton gins are declared to be public utilities, and their operation for the purpose of ginning seed cotton to be a public business. The State Corporation Commission is empowered to fix their charges and to regulate and control them in other respects. No gin can be operated without a license from the Commission, to secure which is required a satisfactory showing of public necessity. Some time after the passage of the original act, it was amended by the addition of a proviso: "that on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred (100) citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin." By an act of the Legislature passed in 1917, permission was given for the for-

(132) mation of co-operative agricultural or horticultural associations not having capital stock or being conducted for profit, for the purpose of mutual help by persons engaged in agriculture and horticulture. In 1919, an act was passed permitting ten or more persons to form a corporation for the purpose of conducting, among others, an agricultural or horticultural business upon a co-operative plan, with certain provisions for the issuance and sale of capital stock, the limitation upon the number of shares permitted to be held by one person, payment of dividends, the setting aside of a surplus or reserve fund, the setting aside of five per cent for educational purposes, and the manner in which the remainder of the profits of the corporation must be apportioned among its members. The appellee, Durant Company, was organized in 1926, under the act of 1919, and made application for a permit to establish a cotton gin at Durant, covering the same location as that for which the appellant had obtained his permit under a showing of public necessity. Upon the filing of the application of appellee Company for a permit, appellant protested in writing, and there was a hearing before the Commission upon the ground that there was no showing of public necessity for the establishment of this additional utility. The Commission, however, rejected the offer to show that there was no further necessity, and held that the proviso made it mandatory to grant the permit applied for, without regard to necessity. Thereupon, suit was brought to enjoin the Commission from issuing the permit, and to enjoin the Durant Company from the establishment of its enterprise, upon the ground that the proviso, as construed and applied by the Commission, was invalid as contravening "the due process and equal protection of the law clauses of the Fourteenth Amendment." The Supreme Court, reversing the lower court, sustained these contentions. The whole opinion is instructive, but, for the purposes of this case, we need only quote the following:

"Appellant, having complied with all the provisions of the statute, acquired a right to operate a gin in the city of Durant by valid grant from the state acting through the corporation commission. While the right thus acquired does not preclude the state from making

(133) similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights. * * * The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law. * * * Immunity to one from a burden imposed upon another is a form of classification and necessarily results in inequality; but not necessarily that inequality forbidden by the Constitution. The inequality thus prohibited is only such as is actually and palpably unreasonable and arbitrary. * * * The purpose of the clause in respect of equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. * * * This Court has several times decided that a corporation is as much entitled to the equal protection of the laws as an individual. * * * The converse, of course, is equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case, the classification, in order to be valid, 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"

The Court further declared:

"That the immunity thus granted to the corporation is one which bears injuriously against the individual does not admit of doubt, since by multiplying plants without regard to necessity the effect well may be to deprive him of business which he would otherwise obtain if the substantive provision of the statutes were enforced."

See, also, Public Service Commission v. Utilities Company, 289 U. S. 130, 53 S. Ct. 546, 77 L. Ed. 1080; Hegeman Farms Corporation v. Baldwin, 293 U. S. 163.

In the instant case, the bill alleges, and the motion

(134) admits, plaintiffs' franchises and compliance with the law. Their obligation to adequately serve the communities proposed to be served by the Buzzard Roost project is admitted, as well as their ability to do so. That their rates are fair and reasonable is also admitted, as also that they will suffer irreparable injury by the competition proposed. In this connection, it should be borne in mind that what the County proposes to do does not involve one of the ordinarily administrative functions of the Government, but the establishment of a proprietary business of the same identical character as that of the plaintiffs, and for which the bill alleges, and the motion to dismiss admits, there is no necessity. If the County may do this without reference to the property rights and franchises of the plaintiffs, the business which the plaintiffs are required to continue, as well as the service which they are required to furnish, is in imminent danger of being impaired, if not destroyed. It is to be noted that in City of Allegan v. Consumers' Power Company, (CCC-6), 71 F. (2d) 477, much relied upon by the defendants, as well as certain others of the cases in which injunction was refused, the decision turned entirely upon the right of the plaintiffs, as taxpayers, to maintain their causes in equity. In 5 Pomeroy's Equity Jurisprudence, (2d Ed.), §§583-584, Page 4558, et seq., will be found a succinct and accurate statement of the law declaring an injunction to be the appropriate remedy to protect a party in the enjoyment of both an exclusive and non-exclusive franchise against continuous encroachments. See, also, Gallardo v. Porto Rico Railway, Light & Power Co., (CCA-1), 18 F. (2d) 918, 922; City of Campbell, Mo., v. Arkansas-Missouri Power Co., (CCA-8), 55 F. (2d) 560, 562; Iowa Southern Utilities Co. v. Cassill, (CCA-8), 69 F. (2d) 703, 704; Oklahoma Utilities Co. v. City of Hominy, (DC Okla.), 2 F. Supp. 849, 851; Missouri Public Service Co. v. City of Concordia, Mo., (DC Mo.), 8 F. Supp. 1, 4; Princeton Power Co. v. Calloway, (W. Va.), 128 S. E. 89; Puget Sound Traction, L. & P. Co. v. Grassmeyer, 102 Wash. 482, 173 Pac. 504, L. R. A. 1918F, 469, 474. In passing upon the foregoing issue, it must be understood that nothing that has been said is intended to challenge the abstract rights of a county or municipality in South Carolina, under the State Constitution, to establish utilities plants of the character proposed, nor the abstract right,

(135) where legally authorized to do so, to fix rates. The plaintiffs base their right to equitable intervention upon the concrete claim that the County proposes to establish a proprietary business enterprise and enter into illegal and unfair competition, and to fix illegal and ruinous rates, in competition with the plaintiffs, as public utilities companies, who are burdened by law with many other expenses and obligations from which the County is relieved.

Having disposed of the issues embraced in the foregoing discussion, we come now to what is regarded as the most important and far-reaching of the issues presented, presenting questions of law at once difficult and delicate of determination, and requiring most extensive investigation and most serious deliberation. These involve:

5. Constitutionality of Title II of the Act, providing for the establishment of the Public Works Administration, as applicable to the facts of this case. It is the plaintiffs' contention that the authority thus conferred by Congress is not embraced within any of the delegated powers of Congress, and is also violative of the Fifth, Tenth and Fourteenth Amendments to the Constitution. The defendants assert its constitutionality under the congressional powers conferred by Article 1, Section 8, of the Constitution, and particularly, under Clause 1, empowering Congress "to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; * * * ;" also, under Clause 3 of that Section, empowering Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;" also, under the general or collective powers embraced in Clause 18 of that Section—"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof;" and under Article 4, Section 3, Clause 2, by which Congress has power to dispose of the property of the United States. I conceive it to be a duty

(136) from which I may not escape to determine the constitutional issues thus presented, and upon which the plaintiffs have invoked, and have a right to require, my conclusions. I am fully conscious of the responsibility thus imposed, and of the rule, which has frequently and uniformly been reiterated by the Supreme Court, that a legislative act should not be declared unconstitutional in any respect except for the clearest and most convincing reasons. The rule laid down by the Supreme Court of South Carolina goes to the extent of declaring that such an act should not be declared unconstitutional unless its infirmity appears to the satisfaction of the Court beyond a reasonable doubt. These principles are founded upon the soundest and most impelling of reasons. The positive provisions of all our Constitutions, State and National, dividing as they do the powers to be exercised by government into three branches, forbid the encroachment by one branch upon the just prerogatives of another. The courts have no right in the abstract to interfere with the enforcement of a legislative act, nor even to declare it unconstitutional, unless empowered by the Constitution itself to intervene for the protection of personal or property rights guaranteed by that instrument. On the other hand, where a right exists and is invoked, which the Constitution makes it the duty of the courts to protect, they may not, without dereliction of duty and betrayal of their trust, decline to function. Therefore, it follows that they are charged with no higher or more imperative duty than that of protecting the citizens against unconstitutional encroachments upon the rights guaranteed by that document. We are confronted here with a case which requires extreme caution, and which, if such were ever permitted, would justify the greatest reluctance to decide. We take judicial cognizance of the facts set out in Section 1, Title I, of the National Industrial Recovery Act, that the country was and is confronted with a national emergency productive of widespread unemployment and disorganization of industry, and that Congress was called upon to exercise every reasonable means within its constitutional powers to relieve that emergency. Confronted as it was and is with a situation so desperate, and with the further necessity of taking immediate and drastic steps for relief by calling into exercise every power with which it is clothed

(137) by the Constitution, and with exercising those powers to the utmost limits of the grant, it was naturally to be anticipated that some of the enactments of the Congress would transcend the constitutional limitations. In the twilight zone of these limitations it should be no matter of criticism, and certainly it is not the intention of the Court to criticize Congress for lack of discernment of the exact boundary of its powers, nor the executives for carrying into effect the enacted laws. It was almost inevitable that mistakes should be made. If and when these should occur they had and have a right to rest upon the assurance that the powers of the courts should be invoked, and would be invoked, to correct their error, and to preserve and defend all constitutional guaranties, as by their oaths, as well as those of the courts, they are bound. If and when, therefore, the courts are called upon to discharge this duty of preserving constitutional rights, they should naturally receive the commendation rather than the condemnation of the legislative and executive authorities, as well as the general public, who, in common with the courts and as a matter of patriotism, must or should desire the preservation of these fundamental rights. The fact, in so far as it be a fact, that powers within the constitutional grant had not previously been asserted would furnish no consideration whatever for denying the present right to invoke these powers. However, it is well settled, as stated in Home Building & Loan Association v. Blaisdell, 290 U. S. 398, 425-426, 54 S. Ct. 231, 78 L. Ed. 413, 88, A. L. R. 1481, that "emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system. While emergency does not create power, emergency may furnish the occasion for the exercise of power." And, quoting from Wilson v. New, 243 U. S.

(138) 332, 348, the Court further said: "Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." If emergency could be construed to grant new powers to Congress, the mere declaration by Congress that an emergency exists in any particular would permit an enlargement of legislative privileges and the consequent amendment of the Constitution, in contradiction and destruction of the requirements of that instrument. That may not be done by any one or the combined cooperation of all of the coordinate branches of the Government. It may not be accomplished by legislative, executive and judicial cooperation. It may not be done by cooperation of these with the legislatures of every state in the Union. The right of amendment is reserved to the people from whom the powers conferred expressly emanated, and whose voice, by a two-thirds vote, either through delegates in constitutional conventions assembled or representatives in the legislatures of two-thirds of the States, must determine. If it were otherwise, the guaranties for which our ancestors, particularly those of Anglo-Saxon blood, fought for almost a thousand years could be bartered away at will. Acquaintance with current affairs brings to view the claims of certain public writers and public speakers, who maintain that the Constitution was intended to be an elastic instrument, to be interpreted in the light of modern needs, and that it is the duty of the courts to construe the instrument in the manner best suited to reach those needs. If this were permissible, and the courts and the legislative bodies were required to meet the demand of every passing clamor, the rights obtained through the years of sacrifice of our ancestors would soon be wiped out. We prefer to follow the view expressed by the late Mr. Chief Justice Taft, who said, in effect, that our form of government could not be changed by judicial pronouncement. Time will not permit us in this opinion to review the various steps through which our independence was achieved and our liberties guaranteed under the provisions of the supreme law of the land. The fact remains that the purposes of these sacrifices were finally accomplished and guaranteed in the adoption of the Constitution, under which for approximately one hundred and fifty years the Nation has

(139) grown and prospered, and enjoyed a degree of liberty beyond that of any other nation on earth. The battle-cry of our soldiers in the World War was to make the world safe for democracy. Among the results accomplished was the dethronement of many kings and emperors. There was universal approval and gratification in America at the accomplishment of this first purpose. There followed in many countries the establishment of so-called republican forms of government, but the second great and indispensable necessity of constitutionally guaranteeing the liberties thus obtained was omitted, and the tragic results are known to all. Instead of the guaranty of liberty to the people, there were set up dictatorships, more absolute and more oppressive in many instances than anything that had existed under more or less absolute monarchs. The sanctity of the home, the right to acquire property and to enjoy the fruits of one's industry, the right of religious worship, freedom of speech, and many other things jealously guarded by our Constitution, were and are discarded. It is due to the gallant members of the American Legion, and to their comrades in arms who made the supreme sacrifice, that American should see to it that their struggles and sacrifices were not in vain. To that end every guaranty of our Constitution should be preserved, and every encroachment thereon resisted. The government under which we live and prosper is essentially a republican form of government, and utterly opposed not only to royal domination, from which we were freed by the Revolution, but equally opposed to other forms, whether communistic, socialistic, bureaucratic, or dictatorial. If it should ever occur that the people desire to substitute one of these forms, let it be accomplished by proper amendment of the Constitution as the law provides.

Coming specifically to the consideration of the question of the preservation of property rights involved in the instant case, the pronouncement of the Supreme Court in Knoxville v. Water Company, 212 U. S. 1, 18, 29 S. Ct. 148, 53 L. Ed. 371, is in point and impressive. Among other things, the Court said:

"Our social system rests largely upon the sanctity of private property, and that State or community which

(140) seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence."

The defendants' claim of constitutionality is to be tested by the settled principle that the United States Government is one of delegated powers, which Congress may not transcend, and that the right to legislate must depend upon specific constitutional grant or be necessarily incidental thereto. So far as the rights conferred under Clause 18, Section 8, Article 1 of the Constitution are concerned, they so obviously are limited to the specified purposes named in other clauses of that section as to need no comment, and, indeed, the argument of counsel is practically, if not entirely, limited to claims of right arising out of Clauses 1 and 3 of said section, popularly designated as the general welfare and commerce clauses. Furthermore the mention of Clause 2, Section 3, Article 4, in the argument is rather incidental than otherwise. The National Industrial Recovery Act itself in terms declares the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce, and to provide for the general welfare, and bases its assertion of authority on the power conferred by the clauses thus invoked. We think that it will be sufficient, therefore, to limit our further discussion to these two clauses and consider them in their inverse order.

A. Commerce. That the legislation in question does not come within the powers of Congress under the commerce clause seems too well settled to require argument. If there could have existed any doubt under the Constitution as originally adopted, that was effectually removed by the subsequent and almost immediate adoption of the first ten amendments, each in turn being a restriction upon federal power, and each specifically prohibiting the enactment of laws regarding matters affecting individual rights and local self-government, the Fifth Amendment affecting particularly property as well as personal rights, the Ninth Amendment, declaring that

(141) "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people," and the Tenth Amendment, especially reserving to the states, respectively, or to the people, all powers not delegated,—and, I may add, not specifically delegated—to the United States by the Constitution nor prohibited by it to the states.

What is interstate commerce, and when an article locally produced or manufactured becomes the subject thereof, has frequently from an early period of our national existence been clearly defined and outlined, and no principle seems more clearly established than that the regulatory powers of Congress, under the commerce clause, may not be invoked as to purely intrastate enterprises. The first clear case thus decided was that of Gibbons v. Ogden, 22 U. S. (9 Wheat.) 1, 83, where the Court, speaking through Mr. Chief Justice Marshall, said:

"The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. * * * Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. * * * It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations. * * * The subject to which the power is next applied, is to commerce, 'among the several states'. The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say, that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. * * * The genius and character of the whole government seem to be, that its action is to be applied to all the external

(142) concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a state, then, may be considered as reserved for the state itself."

See, also, Brown v. Maryland, 25 U. S. (12 Wheat.) 266. The language of Mr. Justice Lamar in Kidd v. Pearson, 128 U. S. 1, 20, 9 S. Ct. 6, 32 L. Ed. 346, is particularly applicable here, to the effect that "no distinction is more popular to the common mind or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation." Quoting from County of Mobile v. Kimball, 102 U. S. 691, 702, the learned Justice further said:

"Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities."

Continuing the Court said:

"If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? * * * The power being vested in

(143) Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local in all the details of their successful management."

The Court goes on to call attention to the danger, in attempting to regulate internal affairs, of conflict between the state and federal laws, saying: "A situation more paralyzing to the state governments, and more provocative of conflicts between the general government of the States, and less likely to have been what the framers of the constitution intended, it would be difficult to imagine." See, also, License Tax Cases, 5 Wall. 462, 470. There followed decisions by the Supreme Court to the same effect and further outlining the specific requirements to constitute an article one in interstate commerce. A recent one is that of Chassaniol v. Greenwood, 291 U. S. 584, 54 S. Ct. 541, 78 L. Ed. 1004, wherein the Court declared that ginning cotton, transporting it to a place within the same state, and warehousing, buying and compressing it there, are each steps in preparation for the sale and shipment in interstate or foreign commerce, but that each of such steps prior to the sale and shipment is local, and a transaction in intrastate commerce. In Hammer v. Dagenhart, 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101, 3 A. L. R. 649 Ann. Cas. 1918E, 724, the Court, quoting from In re Green, 52 Fed. 113, stated:

"When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier, for transportation, or the actual commencement of its transfer to another state."

See, also, Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715. In the light of these cases, and many others to the same effect, we fail to find the slightest justification of the right of Congress to legislate in the instant case under the commerce clause. The proposed project is not only limited to doing business within the State boundaries, but is further limited to certain counties in the State, and the legislative act under which its

(144) authority was granted to the same extent limited the territory in which it was given the right to conduct the business. In argument, counsel for the defendants suggested, but did not argue in extenso, the right of Congress to aid the project for the purpose of regulating the flow of the stream, and thus contribute to its navigability at points nearer the sea. It was not contended, however, that the stream is or may be made commercially navigable at or near Buzzard Roost, nor that in establishing the project anything further was contemplated than to develop, transmit and sell electrical power locally. Congress has not acquired, not attempted to acquire, the plant, nor does the contract contemplate its acquisition, maintenance or operation for any purpose other than that of operating the electrical power project as stated in the contract and in the acts authorizing its construction by Greenwood County. I see no merit, therefore, to this contention.

B. General Welfare. Both before and ever since the adoption of the Constitution, the proper interpretation of its general welfare clause has been the subject of much discussion and controversy. At the beginning, the chief exponent of the contention that it should itself be interpreted to enlarge the powers of Congress, and, independently of all other sections, confer a substantive right to legislate upon all matters affecting the common good of the nation, and clothing Congress with discretionary powers in the determination of what constitutes the general welfare, was Alexander Hamilton. It is well known that his views were that the Constitution should provide for a greater centralization of powers in the Federal Government. Championing the opposing view, to the effect that the expression was not intended to create any additional power in Congress, but was a term employed to qualify the purposes for which taxes, duties, imposts and excises should be laid, was James Madison. It is also well known that the Madisonian interpretation was the one which the Convention accepted and upon which it acted and the uniform line of decisions of the Supreme Court has approved this interpretation. As operating upon this clause, the Supreme Court has uniformly recognized the restrictions placed upon Congress in other sections of the Constitution. It is a matter of common knowledge that the antagonism of the people

(145) and of the several states would never have permitted the adoption of the Constitution if the Hamiltonian contention had been aaccepted or thought even possible. Even after the adoption of the original instrument, as stated above, the first ten amendments were almost immediately adopted for the purpose of more clearly defining this view, and of more effectively denying to Congress the right to legislate upon purely local affairs not affecting interstate commerce, and it is now generally conceded that the only substantive power granted in the clause under discussion is that of laying taxes, etc., and that the remainder of the provision, specifying the purposes for which taxes can be levied, is a limitation upon that power. Story, in his Commentaries on the Constitution, published in 1883, said (§919):

"A power to lay taxes for any purposes whatsoever is a general power; a power to lay taxes for certain specified purposes is a limited power. A power to lay taxes for the common defense and general welfare of the United States is not in common sense a general power. It is limited to those objects. It cannot constitutionally transcend them." (See 1 Willoughby on the Constitution, 2d Ed., §61, Pages 97-98.)

Further commenting upon this subject in the same work, (§§907-908), this learned writer and recognized authority on the interpretation of the Constitution, said that if the clause be interpreted, as is contended for by the defendants in this case, to constitute another and distinct, substantial power, "then it is obvious that, under color of the generality of the words 'and provide for the common defense and general welfare', the government of the United States is, in reality, a government of general and unlimited powers, notwithstanding the subsequent enumeration of specific powers." We invite especial attention to the able opinion of Judge Rogers in United States v. Boyer, (DC Mo.), 85 Fed. 425; also to the learned opinion pronounced by the Supreme Court of the Massachusetts in Lowell v. City of Boston, 111 Mass. 454, 15 Am. Rep. 39; to Wiseman v. Tanner, 221 Fed. 694; and to the admirable opinions of Newton D. Baker and James M. Beck, filed in their printed brief rendered to the President of the Edison Electric Institute, dated November 22, 1934—January 11, 1935. We

(146) fail to find any case decided by the Supreme Court approving the interpretation here asserted by the defendants. In every case decided by that tribunal, and they are many, it has been uniformly held that every other section of the Constitution providing for restrictions upon the power of Congress must be given full force and effect, and that no legislation may be enacted by Congress levying taxes for other than public purposes, and that such purposes must be those of the general government and not the public purposes of a state or any political subdivision or community thereof. Congress may not legislate either for the establishment or the support of such local enterprises under the guise of general welfare. To permit this to be done would be to destroy the barriers provided in specific sections of the Constitution against Congressional encroachment upon states' rights and local self-government. In Collector v. Day, 78 U. S. (11 Wall.) 113, 124, 20 L. Ed. 122, the Court said:

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: 'The powers not delegated to the United States are reserved to the States respectively, or, to the people.' The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

In Kansas v. Colorado, 206 U. S. 46, 90, 27 S. Ct. 655, 51 L. Ed. 956, Mr. Justice Brewer, referring to the Tenth Amendment, said that it "disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the man-

(147) ner they had provided for amending that act." Even in passing upon those cases arising under state constitutions, the Supreme Court has been careful to ascertain whether taxation challenged as unconstitutional could be properly designed to be for a public purpose and justified under such claim, and when found not to be so, the right has been uniformly denied as unauthorized invasion of private right. In Loan Association v. Topeka, 87 U. S. (20 Wall.) 655, L. Ed. 455, the Court said: (P. 663.)

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

The Court held that among these is the limitation of the right of taxation; that it can only be used in aid of a public object, an object which is within the purpose for which governments are established; that it cannot, therefore, be exercised in aid of enterprises strictly private, for the benefit of individuals, though in a remote or collateral way the local public may be benefitted thereby; that though the line which distinguishes the public use for which taxes may be assessed from the private use for which they may not, is not always easy to discern, yet it is the duty of the courts, where the case falls clearly within the latter class, to interpose when properly called on for the protection of the rights of the citizen, and aid to prevent his private property from being unlawfully appropriated to the use of others. This case quotes with approval the decision in McCulloch v. Maryland, 4 Wheat. 431, to the effect that the power to tax is the power to destroy, being "the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people." See, also, Parkersburg v. Brown, 106 U. S. 487, 1 S. Ct. 442. In Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185, the Court said: "Taxation, by the very meaning of the term, implies the raising of money, for public uses, and excludes the raising if for private objects and purposes." See, also, Cole v. City

(148) of LaGrange, 113 U. S. 1, 5 S. Ct. 416, 28 L. Ed. 896; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369; Dodge v. Mission Township, 107 Fed. 827; Sharpless v. Mayor, etc., 21 Pa. 147. In the last mentioned case the Court, at Page 169, said:

"Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation, and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them."

In Dodge v. Mission Township, supra, the Court said:

"A legislature cannot make a private purpose a public one by its mere fiat, and the determination of the question in any case whether or not a given object is public or private is a judicial, and is not a legislative, function."

In Amazon Petroleum Corporation v. Railroad Commission, (DC Tex.), 5 F. Supp. 639, 647-8, the Court quoting argument made by counsel now Mr. Chief Justice Hughes, in 1926, said:

"I am aware that it has been suggested that such Federal power to control production within the states might be asserted by Congress because it could be deemed to relate to the provision for the common defense and the promotion of the general welfare. * * * Reference is sometimes made in support of this view to the words of the preamble of the Federal Constitution. But as Story says 'The preamble never can be resorted to enlarge the powers confided to the general government or any of its departments. It cannot confer any power per se; it can never amount, by implication, to an enlargement of any power expressly given.'"

The Court calls attention to the fact that this statement was approved by the Supreme Court in Jacobson v. Massachusetts, 197 U. S. 11, 22, 25 S. Ct. 358, 49 L.

(149) Ed. 643, 3 Ann. Cas. 765. Continuing the quotation, the Court says:

"The suggestion to which I have referred is an echo of an attempt to construe Article 1, Section 8, subdivision 1 of the Constitution of the United States, not as a power 'to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States', but as conferring upon Congress two distinct powers, to-wit: (1) the power of taxation and (2) the power to provide for the common defense and the general welfare. In this view, it has been urged that Congress has the authority to exercise any power that it might think necessary or expedient for the common defense or the general welfare of the United States. Of course, under such a construction the government of the United States would at once cease to be one of enumerated powers and the powers of the states would be wholly illusory and would be at any time subject to be controlled in any matter by the dominant Federal will exercised by Congress on the ground that the general welfare might thereby be advanced. That, however, is not the accepted view of the Constitution. (1 Story on the Constitution, secs. 907. 908; 1 Willoughby on the Constitution, sec. 22.) The government of the United States is one of enumerated powers and is not at liberty to control the internal affairs of the states respectively such as production within the States, through assertion by Congress of a desire either to provide for the common defense or to promote the general welfare."

The views above expressed are uniformly sustained and amplified not only in other parts of the opinions quoted, but also in numerous other decisions of the Supreme Court. We deem it unnecessary to prolong the opinion by reference to a number of able opinions recently handed down by District Courts in cases analogous to the instant case, presenting the same view. While there are some decisions to the opposite effect, we regard them in conflict with the established law of the land.

It remains only, therefore, necessary to refer briefly to defendants' contention that, by acquiescence and

(150) failure to question the constitutionality of numerous acts of Congress, making appropriations for such purposes as the purchase of the territory of Louisiana and of Florida, (unquestionably a national public purpose); the transfer of Federal Lands to the States, (not involving taxation for the purpose of purchasing the lands, but merely appropriations to administer properties already owned by the Government, and of which it had the right to dispose); continued appropriations in aid of agriculture and education; distribution in Jackson's day of Federal surplus among the States, (which did not involve the question of right of taxation); the establishment of various public bureaus, etc. We think it a sufficient reply to this contention to say that the right of a citizen, or of a state acting on behalf of its citizens to maintain as a justiciable controversy a suit, under claim of taxpayers' rights alone, to enjoin enforcement on the ground of the unconstitutionality of a statute, in each case indicated, is specifically denied by the decisions hereinbefore cited. In no case, so far as we are advised, has it been shown that the citizen elected to forego a contest in which he had a justiciable controversy. Whatever inference of acquiescence, therefore, may be drawn from failure to contest appropriations in the cases cited by counsel must be limited to that class of cases. The active and successful resistance to unconstitutional encroachments, such as are involved in the instant case, not only appears from the cases above reviewed, but from a vast number of others, all forming a line of unbroken and almost continuous contests. So far, we have limited this discussion principally, if not exclusively, to citations upon the exact issue presented. It is significant to note, however, that in the jealous guarding of the positive rights guaranteed by the Constitution, no exception has ever been made for the purpose of promoting the general welfare. When the majority of the people became convinced that slavery was an evil so great that the general welfare of the country demanded its abolition, nevertheless it was found necessary to accomplish that purpose, not by a legislative enactment, but by the adoption of the Thirteenth Amendment following the arbitrament of war. It has been held that, without a constitutional amendment, Congress may not regulate or abolish child labor, though the products manufactured thereby are intended to be used in interstate commerce

(151) Congress had no power, *under the general welfare clause,* to prohibit the traffic in intoxicating liquors, nor to provide punishment for abuses thereof, until the adoption of the Eighteenth Amendment, prior to which its only powers were based upon the revenue laws, under which laws alone it is likewise permitted to regulate the traffic in opium. The general welfare clause did not authorize Congress to deal with the evils of white slavery, or motor vehicle thefts, or stealing from transportation companies, outside of the authority given under the commerce clause of the Constitution. While these matters were not expressly forbidden to Congress, in such positive language as related to property rights, right of free speech, protection from unreasonable search and seizure, etc., it was conclusively presumed that they came within the rights reserved to the states or to the people. We fail, therefore, to see the force of the argument that the rights here sought have been lost by acquiescence, against the fact that the same or similar rights have been so persistently asserted and so emphatically proclaimed by the Supreme Court. If and when the power of the Government to the unlimited expenditure of money in the establishment of bureaus is questioned in a proper case, a different question may be presented. It is enough to say that the Act here questioned, as applied to the facts of this case, extends the taxation and appropriating powers of Congress to an extent heretofore undreamed of, and that, in our judgment, the right to challenge has not been lost by previous acquiescence in any governmental policy. That many of the provisions of the Act in question are constitutional is not here, and cannot be successfully, questioned. The power of Congress in its discretion to provide any unlimited amount, however extravagant, for the construction of necessary or proper public building, to support the army and navy, to provide for post offices and post roads, to exercise control over interstate commerce, to appropriate whatever funds it may find advisable therefor, and to tax for the maintenance of its governmental activities generally, even though the purpose of the act be largely to relieve unemployment and to increase the spending power of the people, is not subject to review. So long as Congress legislates within the delegated powers outlined in the Constitution, neither its power nor discretion may be reviewed by

(152) the courts. We think it pertinent here to remark that the field and the need for public appropriations have not yet been fully covered. The recognized lack of public buildings at Anderson and Greenwood furnishes apt illustration.

While personally entertaining no reasonable doubt as to the correctness of the foregoing conclusions, we take satisfaction in the assurance that whatever, if any, errors have been committed, are subject to correction, and will, on appeal, be corrected by the Courts of last resort, by whose decisions not one but all guaranties of our liberties must be preserved and defended against all enemies "foreign and domestic".

An appropriate order will be filed in accordance with the views hereinabove expressed.

(s) H. H. WATKINS,
United States District Judge.

Greenville, S. C.,
April 23, 1935.

ORDER.

Filed April 29, 1935.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.
EQUITY 451.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

(153) THIS CAUSE came on to be further heard at this term on the motions of the defendants to dismiss the original bill of complaint as amended by the supplemental bill, and was argued by counsel; and thereupon, upon consideration thereof and on the facts found and the conclusions of law stated in the opinion filed herein on April 23, 1935, it was Ordered, Adjudged and Decreed that the motions by the defendants to dismiss this action be, and the same hereby are, overruled.

It was further Ordered that the defendants, Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, be, and they hereby are, allowed 5 days within which to file an answer to the amended and supplemental bill of complaint.

It was further Ordered that W. M. Walters, of Anderson, S. C., be, and he hereby is, appointed Special Master to take such evidence in the cause as the parties may desire to introduce and to report same to the Court.

This 29th day of April, 1935.

(sd) H. H. WATKINS,
United States Judge.

ANSWER OF GREENWOOD COUNTY AND ITS FINANCE BOARD TO THE AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT.

Filed April 29, 1935.

(Style of Court and Title Omitted.)

The defendants, Greenwood County and The Finance Board for Greenwood County, reserving their rights under a motion to dismiss heretofore filed in this case, answering the amended and supplemental bill of complaint:

1. Admit the allegations of paragraph I of the amended and supplemental bill of complaint.

(154) 2. In answer to the allegations of paragraph II these defendants admit that the copy of the loan and grant agreement attached to the original answer of Harold L. Ickes, Administrator, is a correct copy of the agreement between the County and the United States; and admit that Greenwood County's Finance Board has executed a revised resolution as attached to the original answer of these defendants in this cause.

3. These defendants, on information, advice and belief, deny the allegations of paragraph III.

4. In answer to the allegations of paragraph IV, on information, advice and belief, these defendants deny the same.

5. In answer to the allegations of paragraph V these defendants admit, on information and belief, that the plaintiffs are electrical public utility corporations, and that certain of their rates are subject to the jurisdiction of the Railroad Commission of South Carolina. These defendants deny that the plaintiffs are engaged exclusively in the intrastate sale and distribution of electrical power and energy, but aver that their operations are also interstate in character. These defendants deny, on information and belief, that the plaintiffs are adequately serving the territory embraced in Greenwood, Newberry and Laurens Counties.

6. In answer to the allegations of paragraph VI these defendants, on information, advice and belief, deny the allegations thereof.

WHEREFORE having fully answered these defendants ask that the complaint as amended and supplemented be dismissed.

W. H. NICHOLSON,
R. F. DAVIS,
ROBINSON & ROBINSON,
Attorneys for Greenwood County and its Finance Board.

February 19, 1935.

(155) State of South Carolina,
County of Greenwood.

E. I. Davis, being first duly sworn, says:

That he is one of the defendants in the above entitled action; that he has read the foregoing answer to the amended and supplemental bill of complaint, and the same is true of his own knowledge, except as to matters therein stated on information and belief, and those he believes to be true.

E. I. DAVIS.

Sworn to before me this 29th day of Apr., 1935.

W. M. WALTERS, (L. S.)
Notary Public for S. C.

SEPARATE ANSWER OF DEFENDANT HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, TO THE AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT.

Filed February 15, 1935.

(Style of Court and Title Omitted.)

To the Honorable Henry H. Watkins, Judge of the District Court of the United States for the Western District of South Carolina:

Harold L. Ickes, as Federal Emergency Administrator of Public Works, answering the amended and supplemental bill of complaint herein, states:

I. Defendant admits the allegations of paragraph I of the amended and supplemental bill of complaint.

II. Defendant admits that a copy of the "loan and grant agreement" executed by and between the defendant Greenwood County and the United States of America was attached to the answer of this defendant to the original bill of complaint herein and marked "Exhibit

(156) "A", and avers that said agreement is the only such agreement that has been executed by and between said County and the United States. Defendant admits that a copy of the resolution adopted by the Finance Board of the defendant Greenwood County providing for the issuance of the bonds described in said agreement was attached to and made a part of the answer of said defendant County and the members of its Finance Board.

III. Defendant denies each and every material allegation contained in paragraph III of the amended and supplemental bill of complaint.

IV. Defendant denies each and every material allegation contained in paragraph IV of the amended and supplemental bill of complaint.

V. Defendant has no knowledge as to the allegations contained in paragraph V of the amended and supplemental bill of complaint.

VI. Defendant denies each and every material allegation contained in paragraph VI of the amended and supplemental bill of complaint.

WHEREFORE, this defendant prays judgment that both the original bill of complaint and the amended and supplemental bill of complaint of the plaintiffs herein be dismissed.

HENRY T. HUNT,
as Special Assistant to the Attorney General, Attorney for the defendant Harold L. Ickes as Federal Emergency Administrator of Public Works.

Dated, Washington, D. C.,
February 12, 1935.

(157) **STATEMENT OF EVIDENCE.**

PART I.

STATEMENT OF EVIDENCE UNDER EQUITY RULE NO. 75

(Style of Court and Title Omitted.)

Be it remembered that the above entitled cause came on regularly for trial before the above court, sitting in Equity, on the 19th day of July, 1933, upon the issues formed by the Bill of Complaint, as amended, and the answers thereto, W. S. O'B. Robinson and H. J. Haynesworth appearing as counsel for the plaintiffs, and D. W. Robinson, W. H. Nicholson, and R. F. Davis, appearing as counsel for the defendants.

Pursuant to the order of reference hearings were held before the Referee, W. M. Walters, Esq., on June 12, 13, 14, 15, 17 and 19, 1935, and the following evidence was taken to-wit:

EVIDENCE FOR THE PLAINTIFF.

J. N. STRIBLING, a witness for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am employed by the Duke Power Company in the capacity of civil engineer. I was educated as a civil engineer at Princeton College and have practiced that profession for 20 years. I have made a survey of the proposed Buzzard Roost dam of Greenwood County for the purpose primarily, of determining how the water which would be impounded by that dam would affect structures above the dam and have prepared maps showing the result of that survey. The data for elevations were taken from bench marks shown on Exhibit K-1 attached to Greenwood County's application to the Federal Power Commission.

The plans of the County for their Buzzard Roost

(158) project show that the normal water level will be at elevation 440 and that the maximum flood water level will be at elevation 447. I have determined and shown on the maps which I have prepared where these elevations 440 and 447 would come on the structures in reference to which I have made surveys, namely the Duke Power Company transmission line over the Saluda River, the Seaboard Railway bridges over the Saluda River, and Cane Creek, the Cothran Highway Bridge over the Saluda River, and the C. & W. C. Railway bridge over the Saluda River.

The Duke Power Company transmission line is about 4 miles up the river from the proposed dam site. As a result of the impounding of water by the Buzzard Roost project, with the water level at 440, 17 towers of this line would be partly submerged, and, with the water level at elevation 447, 18 towers would be partly submerged. With the water raised to elevation 440, the maximum height at which any of these towers would be submerged is about 45 feet. That would put the water above the lower cross arm of the tower. With the water level raised to elevation 447, the maximum height at which these towers would be submerged would be 52 feet. That would put the water almost to the second cross arm or middle cross arm. There are transmission wires on each of these cross arms.

The C. & W. C. Railway bridge is located about 14½ miles up the river from the proposed Buzzard Roost dam site. This bridge is composed of two steel trusses which support the track over the main channel of the river. These trusses are supported by three stone masonry piers. On each side of the river there are wooden trestles, that on the north side being about 600 feet long and the one on the south side of the river about 200 feet long and about 30 feet high. Approaching each of these wooden trestles there is an earth fill. If the water should be raised to elevation 440 the piers would be completely submerged, the water being two feet over the top of the piers, the bottom cord or low steel of the trusses would be submerged two-tenths of a foot, the wooden trestles would be submerged to within about one foot of the bottom of the cap and the earth fill approaches would be submerged on both sides to within about four feet of the base of the rail. As shown by the broken blue line

on the map, which is plaintiff's exhibit 2, at elevation (159) 447 the water would completely submerge the trusses, the wooden trestles, the earth fill, and the track.

I have not undertaken to show exactly where the water would come on these structures if the water was raised to 440 or 447 at the dam inasmuch as I have not taken into consideration the fall there would be between the railroad and the dam.

The Seaboard Railway crossing over the Saluda River is composed of three steel plated girders on two concrete piers. On each side of these girders there is a wooden trestle, the one on the south side of the river being about 600 feet long and the one on the north side about 200 feet long. Approaching each of these trestles there is an earth fill, the fill on the south side being about 800 feet long and the one on the north side about 450 or 500 feet long. If the water were raised to elevation 440, the top of the piers would be submerged two and three-tenths feet, the steel girders would be submerged to about the same extent as they rest directly on top of the piers, the trestle approaches would be submerged to within about one foot of the bottom of the caps and the earth fill approaches would be submerged to within about four feet of the base of the rail. With the water at elevation 447 it would come about six feet over the trestle. The steel and timber approaches and the north earth fill approach would be completely submerged and the south earth fill approach would be completely submerged at the end of the trestle.

The Seaboard has a wooden crossing at Cane Creek with an earth fill on each end. If the water were raised to elevation 440, the wooden trestle would be completely submerged, the earth fill on the south would be completely submerged for about 2,000 feet and the earth fill on the north for practically the length of the fill or about 300 feet. With the water at elevation 447 both the wooden trestle and the earth fill approaches would be completely submerged.

The Cothran Highway Bridge over the Saluda River is composed of a steel truss span over the river proper, supported on concrete piers, with concrete approaches. The highway is a concrete paved road. With the water at elevation 440, the water would be three and one-tenths feet below the bottom of the steel trusses and at elevation

447 the surface of the highway would be completely submerged.

(160) The cross arms on the transmission line of the Duke Power Company carry the wires commonly referred to as conductors. These wires are swung on insulators below the cross arms. With the water raised to elevation 440 or 447 it would submerge these conductors.

CROSS EXAMINATION.

I got the water levels from sheet, P. S. 106, furnished to the plaintiffs by Greenwood County. This sheet is a drawing showing a section of the proposed power house. The drawing shows the normal headwater elevation 440 and under flood conditions a 7 foot surcharge on headwater. There is no 447 on the map. The elevation 447 is my conclusion from that statement on the map. I do not know whether the water of this dam will ever get to 447. My sketches are based in part upon the assumption that the water level would reach 447 and I have shown that elevation upon the sketches.

I stated that at elevation 440 one of the towers of the Duke Power Company would be submerged to a depth of 45 feet. The other towers of the Duke Power Company would be submerged to a varying depth. The ground is not level under the tower line.

The 440 level would be four feet below the rail on the Seaboard Bridge; it would be four and four-tenths feet below the rail on the C. & W. C. Bridge; it would be six and nine-tenths feet below the traveling surface of the Cothran Highway Bridge.

RE-DIRECT EXAMINATION.

At elevation 440 the water would be four and one-tenth feet below the low point of the highway on the Cothran Highway Bridge. At that elevation it would be about three feet below the low point of the approaches and about six and a half or seven feet below the high point of the approaches.

(161) J. E. WILLOUGHBY, a witness for the plaintiff being duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a civil engineer and have been practicing my profession since 1887 or almost 48 years. I am chief engineer of the Atlantic Coast Line Railroad Company and have been for about 20 years. I am also chief engineer of the Charleston and Western Carolina an affiliated road and have been for about 3 years. My work during the 48 years I have been practicing my profession has related almost exclusively to railroad engineering.

The C. & W. C.'s. main stem extends from Spartanburg, S. C., through Augusta, Ga., to Port Royal, S. C. Its traffic is largely coal from the Virginia coal fields, merchandise traffic from the central west and it also handles a good bit of perishable products from South Carolina and Florida. It connects at Spartanburg with the Clinchfield, the Southern and the Piedmont and Northern Railroads. The Clinchfield is one of the least lines of the Atlantic Coast Line system. It connects at Augusta with the Georgia Railroad, the Georgia and Florida Railroad, Central of Georgia and Southern Railroad. It connects with the Coast line at Augusta, Ga. and at Yemassee, S. C. The C. & W. C. is part of the through route to the middle west and the Clinchfield is part of the main stem of the C. & W. C.

I am familiar with the crossing of the C. & W. C. over the Saluda River above the proposed Buzzard Roost dam site. The C. & W. C. Bridge consists of two truss spans, of 127 feet length each, over the channel of the river, two trestle approach spans aggregating 825 feet and a short earth fill at each end of the wooden trestle approaches. With the water at elevation 447 the water would be above the top rail of the C. & W. C. for the entire length of the bridge and its approaches. At 440 elevation the water would be in contact with the bottom cord of the steel span, one foot below the bottom of the cap and would come very near to the top of the fills. It would be four feet below the base of the rail.

If this dam should be constructed by the County it would be necessary to raise the track, if the C. & W. C.

(162) is to continue to operate in flood times. In order to prevent overflow it would be necessary to raise the track from one hillside to the other hillside in advance of possible floods. The track that is now on the trestle would have to be raised and in order to make a safe job some other form of construction that would not require annual repairs would have to be substituted for the trestle approaches. The form of construction that would work most economically would be concrete piers and steel girders. As the trestle would be under water they would have to be repaired annually. In fact, no repairs could be made on the trestle while water is there. The trestle is of such height that it is necessary to have longitudinal cross bracing to operate at ordinary speed. The earth fill approaches would have to be raised above high water too and the slopes would have to be flattened. In addition to the flattening it would be necessary to [illegible] the slopes against the water action. The flattening is necessary to prevent the fill from being saturated and sloughing. The earth fill as we have in South Carolina will stand in the dry one and one half on one; in the water it will stand three on one. Sometimes it will stand a little steeper but three on one is prudent engineering on fills. If you raise the approach to provide a 447 elevation you would have to raise it 11 feet.

I have made an estimate of the cost of making the required changes in the C. & W. C. bridge so as to provide a structure insuring safety to the traffic of the C. & W. C. providing there is no flood in excess of 445. That estimate is $260,000.00. It consists of raising the approach fill, replacing the defects in the track that result from the raising, the replacing of cross ties, track fastenings, ballast, toe wall for fill, paving for fills in water in the amount of $80,375.00. Construction of 840 lineal feet of deck plate girder spans on plain concrete piers, including excavation, foundation piles, concrete, placing the steel spans, placing of wooden deck on steel spans, painting of steel spans, raising of present track, and additional piles and caps, in the amount of $111,095.00. Raising the two existing steel truss spans 9 feet, which includes the blocking, steel grillages, foundation piles, reinforced concrete pier jackets, labor raising span, and construction of 5½' run-off at each end of truss spans in the amount of $38,025.00. For miscellaneous and other costs such as delays to trains, supervision of the rail-

(163) road company and telegraph service, in the amount of $10,000.00. For engineering and contingencies $20,505.00. Making a total of $260,000,00. This expense of $260,000.00 would be necessary to make the C. & W. C. bridge over the Saluda River reasonably safe for operation.

Sometime ago we had a request for an estimate upon certain changes in this bridge. On November 10, 1933, Mr. Duncan wrote to Mr. L. S. Jeffords, Superintendent, that the County of Greenwood planned to build a dam across the Saluda River about 15 miles below the C. & W. C. bridge across the Saluda River. (This letter was admitted in evidence as Plaintiffs' Exhibit No. 6 and is hereto attached.) This letter was referred to me individually and I replied to Mr. Duncan on November 14, 1933. I made an estimate of the cost of raising this bridge and sent this estimate to Mr. Duncan with my letter. (This letter was admitted in evidence as Plaintiffs' Exhibit No. 7 and the estimate referred to in the letter as Plaintiffs' Exhibit No. 8, both of which are hereto attached.)

In making reply to Mr. Duncan and in giving him the information contained in that estimate, I did not make any examination of the County's proposed dam or where the water would come on the C. & W. C. Bridge or how the dam affects the bridge. The only information we had was that contained in Mr. Duncan's letter. We made an estimate to raise the track and the approaches four and one-tenth feet above the existing level and nine and one-tenth feet above the existing level. We made no estimate for protection against flood damage, sloughing or other features. At that time I did not make any estimate of what it would cost to substitute this trestle. I made such an estimate afterwards and furnished it to Mr. Duncan. The estimate sent Mr. Duncan with my letter of November 14, 1933, did not take into consideration any changes that would have to be made on the earth fill approaches. I gave him simply the information he requested as to raising the existing structures the number of feet referred to and nothing more.

CROSS EXAMINATION.

I am a civil engineer and not a hydraulic engineer. The C. & W. C. bridge over the Saluda River was built

(164) before the year 1913 as in that year I came here from North Carolina and the bridge was then in existence. I do not know at what valuation this bridge is carried on our books.

The Interstate Commerce Commission made an estimate of the cost of reproduction of that bridge which estimate was protested in a hearing before the Commission. The Commission stuck to their values after the Supreme Court said that no use can be made of these values until some attempt is made to get money or take property. (By agreement of counsel it was stipulated that the plaintiffs object to each question and answer relating to this subject.) The paper which you handed me is a purported valuation by the Interstate Commerce Commission reads: "Total bridge cost of reproduction $45,688.00. Cost of reproduction less depreciation $34,775.00."

I said that the information which I furnished with my letter of November 14 to Mr. Duncan was based upon the statements contained in Mr. Duncan's letter of November 10th. I do not know whether the information furnished in Mr. Duncan's letter is true or not. I have not checked his information. Mr. Duncan asked me for estimates upon raising the bridge four and one-tenth feet and nine and one-tenth feet and the estimates which I furnished with my letter of November 14 were estimates for raising the bridge itself, the trestle, and the fills to those heights. Those are the three portions of the roadbed that would have to be raised. The estimates do not call for the same kind of bridge that is there now. The request calls for raising the bridge vertically. When the bridge is raised vertically it would not be the same kind of bridge because there would be some elements of hazzard. The C. & W. C. connects at Spartanburg with the Piedmont and Northern. We have a physical connection there, but they are competitors and the competition has been such that they have been engaged in law suits. I knew nothing about the project which the County proposed to undertake and knew nothing about the estimate required except what is stated in Mr. Duncan's letter of November 10th.

After I had given Mr. Duncan this estimate in 1933 Mr. Monroe Johnson and Mr. Roberts came to see me. They represented the Duke Power Company. After Mr. Johnson and Mr. Roberts had a conference with me, in

(165) response to the request from Mr. Johnson for an estimate of what the C. & W. C. would prudently require, we made the estimate of $260,000.00, and furnished copies to Mr. Duncan. The structure considered in this estimate will be permanent so far as the structural approach is concerned. It will not be so good as the present structure so far as the earth approach is concerned or the truss span. This estimate calls for the substitution of steel spans instead of wooden trestle work such as we now have. The reason is that a wooden trestle span with water at elevations 440 and 447, I believe, would be a hazardous condition for the railroad company to maintain. We do not interpret our duty to the public to mean that we should turn over our property for maintenance, so we must have the right to maintain our bridge as and when it needs it, when economic conditions permit and when we have the opportunity to do the work. The answer to your question as to whether we have an opportunity to make repairs if there is a 25-foot drawdown from the 440 normal level is "no" and being "no" it would not be wholly true because when the water was drawn down an inspector could look at the trestle, but the force may not be available for making repairs or materials may not be available and it might not be economical to do so. It could not be done except at greater cost. It would involve the reconstruction of the trestle so such could be done. Furthermore, when timbers are subject to saturation the timbers become soft and the need for inspection becomes so much greater. If the pond is down 25 feet the trestle could be inspected but so long as the trestle is in other hands it would be imprudent for the railroad to maintain it on somebody else's drawdown. I think railroads do have trestles over hydraulic ponds.

RE-DIRECT EXAMINATION.

Mr. Johnson and Mr. Roberts came to see me and stated they were in the employ of the Duke Power Company. They asked me to make an estimate of what the C. & W. C. ought to require if the project should be built. The estimate which I made in response to that request was $260,000.00.

After I made the estimate of $260,000.00 I had certain communications by letter and verbally with Mr. Duncan and he requested me to make certain other esti-

(166) mates for him upon specific things which he requested. These estimates embraced and covered the specific changes referred to in Mr. Duncan's request. In my letter to Mr. Duncan of February 1, 1935, I made an additional estimate for Mr. Duncan. (This letter was introduced in evidence as Plaintiffs' Exhibit No. 9 and a copy thereof is hereto attached.)

The estimate of $260,000.00 is the estimate I made on the part of the C. & W. C. Railroad for a safe bridge under the conditions named, that is, not more than a 5 foot flood or 440 elevation at the dam site. If there should be more than a 5 foot flood, as for example, a 7 foot flood, the estimate would be increased something like 5 or 10%. It would be increased because the piers would be somewhat higher, the fills would be somewhat higher, and there would probably be a little more material in the piers. If there should be less than a 5 foot flood, the estimate would be somewhat decreased.

RE-CROSS EXAMINATION.

On February 4, 1935, I sent Mr. Duncan the cost of raising the bridge 4 feet, filling in 180 feet of trestle, and replacing the remainder of the trestle with steel girders supported with masonry piers with provision for 10 feet future raise of bridge. The estimate's total was $189,000.00. On February 2, 1935, I gave Mr. Duncan an estimate of the cost to raise the grade of the Saluda River crossing 4 feet, fill 180 feet present trestle, replace the rest with steel 60 foot spans, raise present truss spans, pave two to one slopes with 12" of riprap, hand laid, aggregating $155,500.00; and an estimate to raise the grade 4 feet, present trestle replaced by creosoted ballast deck trestle, raise present truss span, pave two to one slopes with 12" of riprap, hand laid, aggregating $94,500.00. The $189,000.00 estimate was to raise the grade 4 feet making provision for a future raise of 10 feet. The piers would be of such strength that you could raise it up 10 feet or more.

On November 14, 1933, I gave Mr. Duncan an estimate to raise the structure 9.1 ft. at $80,930; 4-1/10 ft. $21,870. This $260,000 estimate is a 9 ft. raise.

RE-DIRECT EXAMINATION.

These estimates of $189,000.00, $155,500.00, $94,-

(167) 500.00, and $80,930.00 about which I have just been examined were made for Mr. Duncan as estimates of the cost of doing the specific things that, Mr. Duncan asked me to make estimates on. On none of those estimates did I make an estimate of the cost necessary to make the track reasonably safe. The $260,000.00 estimate is my estimate of the cost of making the railroad reasonably safe for a 5 foot flood level superimposed on the 440 elevation. (The $260,00.00 estimate was admitted in evidence as Plaintiffs' Exhibit No. 10 and is hereto attached.)

RE-CROSS EXAMINATION.

As to what bridge they desire to build in case this project goes through the C. & W. C. executive officers have not been approached.

E. C. MARSHALL, a witness for the plaintiffs, being duly sworn, testified as follows:

DIRECT EXAMINATION.

I am President of the Southern Public Utilities Company of Maine, and Vice-President of the Duke Power Company. I became connected with the Duke System in 1907, and have been continuously connected since then. I was first Auditor of the Southern Power Company, which position I continued until 1911, at which time I was made Assistant Secretary of the Company. I continued as Assistant Secretary until 1921. In 1913, the Southern Public Utilities Company was organized, and I was Treasurer of the Southern Public Utilities Company until 1921, at which time I became President. The Southern Power Company was the original company that was incorporated, and after that it was consolidated into the Duke Power Company—one of the nucleuses of the Duke Power System. I have prepared a statement accurately and correctly setting forth the facts.

The Duke Power Company is a corporation organized and existing under the laws of the State of New Jersey. It is duly domesticated in the State of South Carolina and authorized to conduct its business as a

(168) public utility in that state. The Southern Public Utilities Company, one of the plaintiffs in this suit, is a corporation organized under the laws of the Staee of Maine. It is also domesticated in the State of South Carolina and authorized to do business as a public utility in this state. Since the institution of this suit there was organized under the laws of the State of New Jersey, the Southern Public Utilities Company of New Jersey, with the same corporate powers and capitalization as the Southern Public Utilities Company of Maine. The Maine Company transferred all of its property, assets and business to the New Jersey corporation as of the close of business of March 31, 1935, and the New Jersey corporation assumed all of the debts, liabilities and obligations of the Maine corporation. Thereafter, on May 1, 1935, the Southern Public Utilities Company of New Jersey was merged with the Duke Power Company. So that now the Duke Power Company owns all of the property assets and business, rights and franchises which were owned by the Southern Public Utilities Company at the time of the institution of this suit, and is liable for all of the debts and obligations of the Southern Public Utilities Company. The Southern Public Utilities Company was reorganized as a New Jersey corporation in order that both it and the Duke Power Company might be organized under the laws of New Jersey and then the two companies merged. This reorganization and merger was approved by the South Carolina Railroad Commission, now known as the South Carolina Public Service Commission, and also by the North Carolina Public Service Commission.

Since this suit was instituted prior to the merger, I shall refer to the two companies and their business as they existed at the time of the institution of this suit. Both the Duke Power Company and the Southern Public Utilities Company were engaged in business as public utilities in South Carolina at and prior to the time of the passage by the General Assembly of that state of Act 871, entitled, "An Act Regulating Persons, Corporations and Municipalities engaged in the Generating, Transmission, Delivery and Furnishing of Electricity for Light, Heat and Power," prescribing the duties of the Railroad Commission in relation thereto and prescribing penalties for violation of the provisions thereof, approved April 8, 1932, and had been engaged in such business for a

(169) number of years prior to the passage of said Act, and have continued in such business ever since its passage. Before the merger of the Southern Public Utilities Company with the Duke Power Company the latter company owned all of the stock of the Southern Public Utilities Company of Maine, and also acquired all of the stock of the Southern Public Utilities Company of New Jersey on its organization. The two companies are usually referred to as Duke Power System, the Southern Public Utilities Company being the wholly owned subsidiary of Duke Power Company. Duke Power System is now, and for a number of years past has been, engaged in the business of furnishing electric light and power service to cities, towns and municipalities, to the residents and industrial enterprises in York, Cherokee, Spartanburg, Greenville, Pickens, Oconee, Anderson, Chester, Laurens, Newberry, Lancaster, Abbeville, Greenwood and Kershaw Counties in South Carolina. In connection with this operation it owns franchises for the conduct of its business in a large number of cities and towns in this state, namely, Anderson, Blacksburg, Calhoun, Campobello, Central, Chesnee, Chester, Clover, Cowpens, Cross Hill, Duncan, Easley, Edgemoor, Fountain Inn, Gaffney, Gray Court, Greenville, West Greenville, Greer, Hickory Grove, Hodges, Honea Path, Inman, Iva, Landrum, Laurens Liberty, Mauldin, Mountville, Newberry, Norris, Pacolet, Pendleton, Pickens, Princeton, Richburg, Reidville, Rock Hill, Sharon, Six Mile, Simpsonville Spartanburg, Union, Walhalla, Waterloo, Wellford, West Union, Whitmire, Woodruff, York, and Yorkville. All these franchises are in court.

In addition to these cities and towns, Southern Public Utilities Company prior to the merger operated, and Duke Power Company now operates, as an electric utility in a large number of unincorporated communities and rural sections. Also, Southern Public Utilities Company formerly operated, and now since the merger Duke Power Company operates, gas, street railway and water utility systems in various cities and towns in the state. In the three Counties of Greenwood, Newberry and Laurens, the Duke Power System owns franchises in the folowing cities and towns: Town of Whitmire, Town of Hodges, City of Laurens, Town of Cross Hill, Town of Waterloo, Town of Mountville, Town of Princeton, City of Newberry and Town of Gray Court. Prior to

(170) the merger the business of Duke Power Company proper was confined very largely to that of an electric generating and transmission company its business being generally limited to the furnishing of power service to industries, municipalities and other utilities, and the major business of the Southern Public Utilities Company was to furnish electric service to residential, commercial and small power users, and to conduct street railway, gas and water utilities service. The Southern Public Utilities Company generated a portion of its electric power, but most of the power which it distributed was delivered to it by the Duke Power Company at different points over the territory. Now, since the merger, the entire business is, of course, conducted by the Duke Power Company. The business of the system extends over what is known as the Piedmont Section of North and South Carolina. (A map showing the transmission system and generating system of the Duke Power System in North and South Carolina was introduced in evidence as Plaintiffs' Exhibit No. 12, the original of which will be transmitted to the Circuit Court of Appeals.)

This system extends from a point 11 miles east of Durham, North Carolina, on the east to a point approximately 20 miles west of Westminster, South Carolina, on the west, a distance of approximately 260 miles east and west, and from Leaksville, North Carolina, on the north to the Lexington plant of the Lexington Water Power Company in South Carolina on the south, a distance of approximately 200 miles north and south. The electric generating facilities of the Duke Power System consist primarily of hydro-electric plants supplemented by storage reservoirs and steam station capacity. The total installed capacity of the system is 883,705 kilowatts, of which 596,705 KW, or 67.5% is hydro and 287,000 KW or 32.5% is steam. This generating capacity is amply sufficient to take care of the present power requirements of the Piedmont Section of the two states, and to provide for any increase in requirements that may be reasonably anticipated in the near future. The Duke Power System has at all times made every reasonable effort to extend the use of electrictiy and to increase its sales of current, and has co-operated in every way it reasonably could to induce industries to locate in its territory. The electric transmission network of the system is connected to each of the 50 sources of power sup-

(171) ply of the system in North and South Carolina, and transmits power from those sources to the consumers in the entire territory served. The major portion of the transmission lines is of double-circuit construction. Where single circuit lines exist, there are usually two sources of power, one at each end. This arrangement of transmission lines, in conjunction with the numerous sources of generation, insures reliable and dependable electric service over the entire territory. The transmission and distribution lines of the system vary in voltage from 115,000 volts for the primary transmission lines down to 110 volts for the secondary distribution lines. The mileage of these lines, referring to them as they were owned and operated prior to the merger, is as follows: Duke Power Company transmission and distribution lines, 2,693 miles; Southern Public Utilities Company transmission lines 327 miles; Southern Public Utilities Company urban distribution lines, 2,312 miles; Southern Public Utilities Company rural distribution lines, 2,639 miles. In South Carolina, Duke Power System owns and operates approximately 2,700 miles of transmission and distributions lines, including, of course, the lines in Greenwood, Newberry and Laurens Counties, which are connected with all generating facilities and sources of power of the system. In the Counties of Greenwood, Laurens, and Newberry, South Carolina, Duke Power System owns and operates 206.26 miles of transmission line (constituting 333.71 circuit miles), and 171.59 miles of urban suburban and rural distribution lines. (A statement showing the transmission and distribution lines of the Duke Power System in Greenwood, Laurens, and Newberry Counties was introduced in evidence as Plaintiffs' Exhibit No. 13, a copy of which is hereto attached.)

Greenwood, Laurens and Newberry Counties are served by means of a double circuit 100 KV tower line loop from Newberry to Greenwood, to Belton to Greenville to Spartanburg and back to Newberry. The sources of power connected with and available for feeding this loop are the (1) Great Falls group of plants, and the other Duke System plants which tie into the Great Falls switching station; (2) Lexington hydro plant and the Parr steam plant; (3) Tuxedo, Turner, Lake Lure and 99 Islands Plants; (4) Tiger Steam Plant at Duncan, (172) and (5) interchange with the Carolina Power and

Light Company at Greenville. In addition, at Spartanburg, Greenville, Belton, Laurens and Greenwood, there are connections to this loop with the Southern Public Utilities Company hydro plants. The transmission lines and connections above referred to at all times and under all conditions insure continuous and dependable power service in this territory. Greenwood can be served with the 100 KV double circuit line from Newberry, or from the double circuit 100 KV line from Greenville, or from both. Also there are connected at Greenwood the 44 KV line from Belton and the 22 KV line from Abbeville, which ties into the Portman Shoals and Gregg Shoals stations. Newberry is the location of one of the largest switching stations of the Duke Power System, and here are connected 4 double circuit 100 KV lines from Great Falls, Lexington, Spartanburg and Greenville, and two 44 KV lines connecting with the Van Patton Station and the Boyd's Mill and Tumbling Shoals Stations. Ninety-Six is on the double circuit 100 KV line between Newberry and Greenwood and can be served from either of these points. Laurens can receive power from the double circuit 44 KV line from Newberry, from the single circuit 44 KV line from Spartanburg and Van Patton Shoals, and from the 22 KV line from Boyd's Mill and Tumbling Shoals. Power sales of Duke Power Company show an almost unbroken record of annual increase up to and including 1929. The record during the past 25 years in five-year periods is as follows: Period from 1909 to 1913, the average annual KWH, 181,935,866. Now that is taken at 100% at that time. Now the period from 1914 to 1918, inclusive, 381,123,739 KWH, or 209.48% increase over the first five-year period that is taken as the 100% period. 1919 to 1923, inclusive, 659,003,530 KWH, or 362.22% over that same period of 1909 to 1913; and the period from 1924 to 1928, average annual KWH, 1,164,242,576, or 639.92%; the period from 1929 to 1933 inclusive, 1,432,201,636 KWH, and the percentage is 787.20. The maximum annual KWH sales amounted to 1,579,943,224 KWHs in 1929. This decreased approximately 16½% during 1932 but increased to 1,443,558,053 KWH, or within about 9% of the maximum sales during 1933. In 1934, this decreased to 1,314,898,297 KWH.

The Duke Power System has from time to time within recent years made reductions in its rates. (A

(173) statement showing the reductions in rates made by the Duke Power System since December 1, 1928, was introduced in evidence as Plaintiffs' Exhibit No. 14, a copy of which is hereto attached.) The first reduction is December 1, 1928, in the amount of $519,400.00. That is an annual reduction in gross revenue based on the years revenue prior to the reduction. If the same number of kilowatt hours had been sold in the previous year at the reduced rate, the gross revenue would have been reduced in that amount. The reduction on November 1, 1932, of $1,515,500.00 was a further reduction in addition to that of December 1, 1928. It does not include the prior reduction. On May 1, 1933, there was a further reduction of $418,100.00, on September 1, 1934, there was another reduction of $1,335,000.00 and on March 1, 1935, a further reduction of $118,500.00 each of which was similar in every respect to the reduction as of December 1, 1938, and November 1, 1932. The total reductions of $3,906,500.00 are reductions for the entire Duke Power System which includes both the Duke Power Company and the Southern Public Utilities Company and includes operations both in North and South Carolina. In arriving at these figures, transactions between the Duke Power Company and its affiliate were eliminated.

The rates of the Duke Power System, including the Duke Power Company and the Southern Public Utilities Company, are subject to the regulation and control of the South Carolina Railroad Commission. This Commission has approved the rates at which both companies are now selling power in South Carolina. Prior to the reduction of September 1, 1934, the South Carolina Railroad Commission had made an investigation of the property and affairs of these two companies. This reduction was in consequence of an order of the South Carolina Railroad Commission and the new rates were approved by that Commission. This investigation had been going on for a couple of years or more prior to September 1, 1934.

Q. Were any negotiations conducted between the rate experts of the Commission and the rate men of the Duke Power System? A. Yes, sir, the rate expert of the Commission was in conference with our rate engineer.

Mr. D. W. Robinson: I suggest that is hearsay testimony.

(174) Taken subject to objection.

A. And as a result of that conference, these rates were reduced in this amount.

The reduction of March 1, 1934, followed that and was approved by the South Carolina Commission and the North Carolina Commission, as were all of these reductions. The Duke Power System maintains the same rates in both North Carolina and South Carolina. There have been no increases in rates since December 1, 1928, that being the time of the first reduction above referred to. I have with me a copy of the rates of the Duke Power Company and Southern Public Utilities Company which have been approved by the South Carolina Railroad Commission. (The plaintiffs introduced in evidence as their Exhibit 15, the rate schedules of the Duke Power Company on file with, and approved by, the South Carolina Railroad Commission, and as their Exhibit No. 16, the rate schedules of the Southern Public Utilities Company on file with, and approved by, the South Carolina Railroad Commission, portions of which are hereto attached.)

The financial structure of the Duke Power Company as of December 31, 1934, is as follows: $283,700.00 of preferred stock of the par value of $100.00 a share; $101,004,897.70 of common stock, each share having a par value of $100.00, and $40,000,000.00 of outstanding bonds. The financial structure of the Southern Public Utilities Company as of the same date was as follows: $21,000,000.00 of common stock, each share having a par value of $100.00; $16,487,000 of its own bonds; and $4,732,000.00 of underlying bonds issued by other companies whose properties the Southern Public Utilities Company has acquired. As the result of the merger the common stock of the Southern Public Utilities Company has been cancelled inasmuch as it was wholly owned by Duke Power Company, and Duke Power Company has assumed the bonds of Southern Public Utilities Company, including the underlying bonds referred to. In all other respects the financial structure of the Duke Power Company is the same today as it was December 31, 1934. Without going into details as to the actual investment of the Duke Power System, I think it sufficient to say

(175) that its actual investment in operating properties in the territory it serves is very considerably in excess of $100,000,000.00.

The defendants intend to construct on the Saluda River in this state, at a point known as Buzzard Roost, a hydro-electric plant, with transmission and distribution lines extending into the Counties of Greenwood, Newberry and Laurens, for the purpose of engaging in the business, in these counties, of furnishing electrical energy to municipalities, industrial enterprises, private individuals and to the public generally for domestic, commercial and industrial uses. The project would be constructed with federal funds advanced to the County of Greenwood by the Administrator of Public Works under the National Industrial Recovery Act. A copy of the contract, dated December 8, 1934, between the Federal Emergency Administrator of Public Works and Greenwood County under which these federal funds would be advanced and the project constructed, is attached to the answer of the defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, and marked as Exhibit "A". A copy of the original resolution of the Finance Board providing for the construction of the project and the issuance of bonds to defray in part the cost of its construction is attached to the orignal bill of complaint of the plaintiffs, and is marked as Exhibit "I". This resolution was subsequently amended by The Finance Board and a copy of the resolution as amended is attached to and made a part of the answer of the defendants, Greenwood County and its Finance Board. Exhibit "II", is attached to and made a part of the original bill of complaint of the plaintiffs, is an extract from the application of Greenwood County to the Federal Power Commission, filed September 13, 1934, for a license for the Buzzard Roost project. This extract shows, among other things, the customers with whom the County has entered into contracts and with whom it proposes to enter into contracts for the sale of electric energy which would produced by the Buzzard Roost plant if it should be contracted. Practically all of the customers with whom the County has entered into contracts, and with whom it proposes to enter into contracts, for the sale of power which would be produced by the Buzzard Roost project are now and for a number of years have been customers of the plaintiffs. I have a list of the plain-

(176) tiffs' customers in Greenwood, Newberry and Laurens Counties.

(The plaintiffs introduced in evidence as their Exhibit No. 17, a statement entitled "Duke Power Company (including Southern Public Utilities Company) power sold and delivered in Greenwood, Laurens and Newberry Counties, South Carolina (Excluding intercompany sales) for the calendar year 1934", a copy of which is hereto attached.)

As shown by this statement the Duke Power System has a grand total of 1,190 customers in the three counties of Greenwood, Newberry and Laurens. In the calendar year 1934, the Duke System sold to those customers 62,142,838 KWH. These 1,190 customers of the plaintiffs include only customers receiving service directly from the plaintiffs and do not include customers who received service indirectly. The Duke Power System sells power wholesale to the towns of Greenwood, Ninety-Six, Clinton, Laurens, Newberry, and Prosperity which retail this power, and, consequently, the plaintiffs have no record of the ultimate customers served. In certain cases only the gross number of customers in the counties appear on this statement. This gross figure is given because there are a lot of miscellaneous customers or individuals consisting of residential consumers, churches, stores, etc., which would make too long a list if each were named. The dates listed in the column "Date of Beginning of Service" are the dates at which the plaintiffs began serving the customers opposite whose names those dates appear. For instance, the Mathews Cotton Mill, at Greenwood, has been served since October 18, 1913, and the Newberry Cotton Mills, in Newberry, since August 1, 1911. These customers have been served by us over a long period of time.

I have a statement on which I have shown the customers now served by the plaintiffs in these three counties with whom, according to the County's application to the Federal Power Commission, it has entered into contracts, or proposes to enter into contracts, for the sale of power that would be produced by the Buzzard Roost plant. (The plaintiffs offered in evidence, as their Exhibit No. 18, the above statement, a copy of which is hereto attached.) On this statement there first appears

(177) a list of the customers with whom the County already has made contracts, according to the application which it has filed with the Federal Power Commission. The figures in the column "Sales by Duke Power System for year 1934" show opposite the name of each customer the amount of power sold to that customer during the year 1934 by the Duke System. The last column "Greenwood County's estimate of Annual Power Consumption" shows the amount of power the County expects to sell to each of these customers who are now customers of the Duke System but with whom the County, according to its application, has made contract for the sale of power. During the year 1934 the Duke System sold 12,107,735 kilowatt hours of electricity to these customers with whom the County holds contracts. The second list on this statement shows the customers listed in the County's application to the Federal Power Commission as prospective customers to whom the County might sell power. The figures in the first column show the kilowatt hours sold to these customers by the Duke System during the year 1934 and the last column shows the County's estimate of the annual power consumption by each of these customers as given by the County in its application to the Federal Power Commission. The County has listed in its application either as customers with whom the County has contracts or as prospective customers all but three of the present customers of the Duke Power System in these three counties. This statement shows where we have contracts and where Greenwood County proposes to serve, where they have got actual contracts and where they have got prospective contracts.

The Duke Power Company and the Southern Public Utilities Company are now, and have been for some years past, large property owners and taxpayers to the State of South Carolina, to Greenwood County, and to the Federal Government. I have a statement showing the amount of taxes paid by the plaintiffs on account of their business and property in South Carolina for the calendar year 1934. (The plaintiffs introduced in evidence as their Exhibit No. 19, this statement entitled "Duke Power Company—South Carolina Taxes Paid for the Calendar Year 1934", a copy of which is hereto attached.) In the calendar year 1934 the plaintiffs paid directly to the State of South Carolina, in taxes, $1,478,305.93. In addi-

(178) tion to this, in the year 1934 the plaintiffs paid, on account of operations in South Carolina, Federal excise taxes in the amount of $42,468.02, and other taxes in the amount of $180,093.93, making the total amount of taxes paid on account of business in South Carolina in 1934, $1,700,869.88. The gross receipts of the Duke Power System for the year 1934, eliminating inter-company transactions and sales, was $7,097,510.26, making the ratio of taxes to gross receipts of the System for the year 1934, 23.96%. In other words, out of every dollar of the revenue that we took in practically 24c was paid in taxes.

I have a statement showing the amount of taxes that the plaintiffs paid to Greenwood County for several years past. (The plaintiffs introduced in evidence, as their Exhibit No. 20, this statement entitled "Duke Power Company System Taxes—Greenwood County", a copy of which is hereto attached.) This statement shows taxes which each of the plaintiffs paid to Greenwood County for the years 1929 to 1934 inclusive.

All of the power sold by plaintiffs in the State of South Carolina is sold locally. While part of the power sold in this state is at times generated in North Carolina, yet this power is brought into the state at high voltages and carried to the local substations of the plaintiffs where it is reduced to low voltages, and then distributed to the local customers of plaintiffs in the state. As I have already stated, the rates of plaintiffs for the sale of power in South Carolina are fixed by the Railroad Commission of this state, which by the statutes of South Carolina is given jurisdiction over the rates of privately owned and operated electrical utilities, and plaintiffs' sales of electric power in this state are made at the rates approved by the State Railroad Commission. As I further stated, plaintiffs also do business as electrical utilities in the State of North Carolina, its rates in that state being fixed by the North Carolina Public Utilities Commission. The rates in the two states are the same. Approximately two-thirds of the gross revenue of plaintiffs is derived from their business in North Carolina, and approximately one-third from their business in South Carolina. All the reductions referred to in Exhibit No. 14, other than the reduction of September 1, 1934, were voluntary reductions.

The rates at which the defendants would sell the

(179) electric power which would be produced by the Buzzard Roost project are shown in the extract from the application of Greenwood County to the Federal Power Commission attached to the original bill of complaint, marked Exhibit "II",—and also in the resolution of the Finance Board of Greenwood County, which is attached to and made a part of the answer of Greenwood County and its Finance Board. These proposed rates of the defendants are substantially below the rates of plaintiffs, and I think it is obvious that it is on account of these lower rates that the defendants have been able to make contracts for the sale of the power which would be produced by the Buzzard Roost project with the customers of the plaintiffs. I would not undertake to testify of my own knowledge whether the Buzzard Roost project would be self-supporting at the rates at which defendants propose to sell the power which would be produced by this project, as this is a question for the engineers who have investigated the cost of the project, its power output, and probable revenues and expenses. However, I can say and do say that the defendants could not undersell the plaintiffs and deprive plaintiffs of their business were it not for the fact that the defendants expect to construct the Buzzard Roost project with federal funds, approximately 30% of the cost of the construction, or 30% of the cost of the labor and material employed upon the project, being a gift or grant of federal funds which the defendants will not have to repay, and were it not for the further fact that the Buzzard Roost project will be very largely exempt from the payment of taxes, while as I have already stated, more than 20 cents out of every dollar of gross revenue earned by the plaintiffs in the State of South Carolina goes for the payment of taxes. I do not believe the defendants could construct the Buzzard Roost project and successfully operate it in competition with plaintiffs were it not that the project will be constructed with federal funds which the Administrator of Public Works proposes to advance to the County for the construction of the project. As a matter of fact it is this advancement of federal funds for the construction of the project which will deprive the plaintiffs of their business in the Counties in which the project of the defendants would operate and sell power. I have had experience in financing power projects and selling bonds, and have familiarized myself with such finance

(180) operations. Of course, my position has been such that it has been necessary for me to become familiar and keep up with those affairs and I have had to negotiate or assist in the negotiation for the sale of bonds on our own properties from time to time.

Q. Mr. Marshall, if Greenwood County did not have the benefit of this federal financing to which you have referred, and which it expects to obtain through the Federal Emergency Administrator of Public Works, under which it will sell its bonds to the Adminstrator or the United States, at four per cent. interest, the bonds being revenue bonds and not carrying the general credit of the County, what do you say as to whether the County would be able to finance that project?

Mr. D. W. Robinson: I must interpose my objection to the witness giving an opinion on this question.

A. I don't believe it would be possible to sell them.

Q. Suppose the County had to sell these bonds in the market to private investors. Do you think it would be able to sell them? A. No private investor in my opinion would buy a revenue bond. In this kind of a case they are putting up 100 cents of every dollar into the bonds and that would be taking the private investor's money at a lower interest, and the other fellow would be making the money, if it was made. I don't understand how any private investor could take such a proposition. It is not a mortgage on the property.

Q. The bond holders, in other words, would put up all the money that went into the project? A. That is my understanding of it.

Q. And to get their money back and to get their interest, they would have to depend upon the earnings of the project? A. Absolutely.

Q. And you don't think that bonds of that type, under the circumstances as they appear here, could be sold to private investors? A. That is my opinion.

CROSS EXAMINATION.

This prepared statement that I have given in evidence was prepared under my direction, and in the preparation I asked for the figures and checked them. Mr. E. R. Bucher, Treasurer of the Duke Power Company presented some figures, Mr. Reed, the rate man,

(181) some of the figures, and some engineering data I got from our engineering department—Mr. Nabow and a good many other engineers there. But I have been intimately connected and associated with these companies all the time and I have a fairly good idea of the thing.

In carrying out the Duke System's opposition to the Buzzard Roost project, we first tried to get information as to what was going on—what they proposed, and we tried to get that in the Department of the Public Works in Washington that this matter came under, and we had various steps there, including a hearing. We were represented there by Mr. Robinson and also by Ex-Governor Gardner. Our company protested directly to the President, Mr. Roosevelt. We thought we would protest to the Federal Power Commission but we changed our mind and did not. The P. W. A. gave us a hearing and after the hearing they went ahead and authorized this loan and grant. We are opopsing the Santee-Cooper project in every way we can.

There appears in the capital structure of the company $23,000,000.00 not paid by outside stock. I take exception to the write-up business. There is a difference between that and the value of the property. This is the amount which was set up on the books, or an increase that was made, on the valution of the properties that was made by J. E. Sirrine and Company and the W. S. Lee Engineering Company. A valuation was made at that time and the present day values as of that time were set up. Now, I would like to say in connection with that that the estimate of J. E. Sirrine and Company was the highest one and the W. S. Lee Engineering Company was the lower, and the value was set up on an average between the two. I have no connection at all with the P. & N. Railway. The Duke Power Company owns some stock in the P. & N.

We objected in Washington to Buzzard Roost selling the Greenwood Cotton Mills who are not our customers and never have been. We lost some customers at Clinton. We lost the City of Clinton, the Clinton Cotton Mills, the Lydia Cotton Mills and the Panola Cotton Mills. I think we have the information here about the Grendel Cotton Mills. None of these customers were lost to any power development financed by the Federal government. It would be pretty hard to tell what was the reason in the mind of the customer who declined to renew

(182) a contract. I do not know whether they are buying their power cheaper or producing it cheaper than what they had to pay us. I do know a lot of people think they can. I rather think it is true that most of the textiles in Greenwood County produce their own power but most of the textile mills in the Piedmont Section take power from the Duke System. I think it is probably true that the only plant in Greenwood County which purchases power from the Duke System is the Mathews Mill.

I think it is true that the Duke Power Company furnishes only a small part of the power consumed in Greenwood County. The present installed capacity of the Duke System is ample to take care of the present needs of the Piedmont Section of the Carolinas and should the needs become any greater, we will, as we have done in the past, increase our facilities. It has been a matter of steady growth with us ever since we went into the business. We pioneered in it. We are prepared to furnish additional hydro-electric and steam plants if necessary. I do not think that it is an exactly fair representation of our position to say that we do not wish anyone else to furnish power in this territory. I believe the duplication of investment tends to increase the cost to the ultimate consumer, and I don't believe we will ever get it down unless the investment is held to a minimum. We think, as far as the development of power in the Piedmont Carolinas by anyone else is concerned, that we have power to sell now in excess of our sales and we certainly do not want anybody else to sell a[illegible] of that power. I think it correct that we have h[illegible]n four and five million dollars in undeveloped wa[illegible] resources in this area. This undeveloped property is located on the Catawba River, the Johns River, the Savannah River, the Broad River and its tributaries.

There had been some increases in rates before 1920, I believe, and there had been some decreases. Up to December, 1928, the general tendency had not been up. There has never been but one increase that I remember. That was about 1920 or 1921 and was a rate case we had in North Carolina. We secured the right there to raise our rates.

I am pretty sure that we have brought a new industry into Greenwood County. I remember some silk mill, but I may be wrong about which county. It was in one of these three counties. I don't remember the name

(183) of the mill. The reason I remember about it is that we carried on an active campaign, advertised in the magazines, and advertised the advantages of the Piedmont Section of South Carolina. We have thousands of replies and some people located who didn't come to see us about a location but told us it was a result of that. I cannot name from recollection any industry that we have brought into any one of these three counties. We have sent out thousands of these circulars advertising that and every other county. We sent out thousands, and spend hundreds of thousands of dollars, advertising the Carolinas and their industries.

I do not think the tendency in recent years has been for textile mills to build their own steam plants and not purchase power from us. There have been some who have built steam plants that used a lot of processing steam. I suppose the Grendel Mills did build its own steam plant. If they were all going to do that we wouldn't have any customers. I don't think the percentage of those that have done so has been large.

My company has no investment or affiliate in the Dominion of Canada. I think you have in mind the Duke-Price Company, but there is nobody connected with the Duke System interested in it so far as I know. I don't think any of our companies own stock in the Duke-Price Company. I might say, in answer to that, that the Duke Power Company has no interest in any other system, and no other company has any interest in the Duke Power Company, to answer that fully, any other electric company. We have two contracts with the Carolina Light and Power Company—one to sell them power at Wateree and the other for an exchange of power at Greenville and Wateree. In the contract for the sale of power, the Carolina Light and Power Company agrees, under certain conditions, to pay us so much a day for power. In other words, they have got to pay us a fixed sum per day for power, and there is a certain amount of kilowatt hours that they can take during that day, but they have to pay us at the rate of so much per day whether they take any power or not; and if you reduce it to the price of kilowatts, it is three and one-half mills to June 1, 1939, and then four mills thereafter. The contract, however, is based on so much per day and not so much an hour. It is only related to kilowatts for keeping the amount of kilowatts.

(184) I stated that it was my opinion that the Buzzard Roost project could not undersell the Duke System if it were not for two factors: first, a total or partial exemption from taxation, and, second, a grant from the P. W. A. I understand that it is stated that the grant just about compensates the borrower for the increased wage scale required by the P. W. A. But if a contractor enters into a contract to build he has to pay a higher rate of wages, practically the same rates, I think. I have not looked at that to make sure. It is my opinion that the grant results in a saving to the builder. I have seen the P. W. A. wage scales but I don't know what they are.

I do not know that in the days of 1928 and 1929 a good deal more than the total cost of the project in some sections of the country was raised on bonds. I know we never did it. I am speaking of my information in regard to the financing we have done. More than 100% of the operating funds of other companies may have been raised on bonds, but without going into it, I cannot express an opinion as to whether or not it was done. I don't know much about that wildcat financing because I have never been connected with it. I am not an expert on that and never had any connection with it either.

South Carolina had a survey a few years ago. As far as the values set out in that investigation are concerned, their engineers never made any inventory of our properties. The report prepared as a result of that survey is known as "Report on the Electric Utility Situation in South Carolina, filed December 1, 1931". On page 396, this report reads: "The fair value of the property of the Duke Power Company, December 1, 1931, before the deduction for accrued depreciation, is indicated to be $50,075,588, and after the deduction for accrued depreciation to be $44,363,429. The Company's claimed valuations are $77,472,481 before depreciation, and $75,461,221 after depreciation."

The last two of the five rate reductions since 1928 about which I have spoken were made after the application for the Buzzard Roost project was filed.

RE-DIRECT EXAMINATION.

The plaintiffs have no re-direct examination for Mr. Marshall. Plaintiffs would like to refer to and introduce

(185) in evidence the following from the Report of the South Carolina Power Rate Investigating Committee, to which report the defendants have referred: First, the provisions of the Act of the General Assembly of South Carolina, creating the South Carolina Power Rate Investigating Committee, as set forth in section 87 of the General Appropriations Act of 1931, as follows: "Said committee shall accord to all persons and corporations interested in or affected by the terms of this Section an opportunity to be heard." Also, the following from page 11 of the report: "After the organization of its technical staff, there was left to the Committee less than five months to accomplish all of the investigations delegated to it and to file its report as was required under the Act. Because of this element of time, the Committee manifestly could not go through the usual processes involved in fixing valuations for rate making. It was compelled, therefore, to use short-cut methods in arriving at results upon which rate adjustments could be based."

(The plaintiffs offered in evidence as their Exhibit No. 21 a franchise from the City of Newberry to the Southern Power Company, the material parts of which are hereto attached. The plaintiffs offered in evidence as their Exhibit No. 22 a franchise from the City of Laurens to the Reedy River Power Company, a copy of which is hereto attached. The plaintiffs offered in evidence as their Exhibit No. 23, a franchise from the City of Laurens to the Sullivan Power Company, a copy of which is hereto attached. It is admitted that these franchises, plaintiffs' Exhibits Nos. 21, 22, and 23, have been duly assigned to and are now owned by the Duke Power Company.)

J. E. SIRRINE, a witness for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a designing and consulting engineer, and live in Greenville, South Carolina, where I have resided since 1876. I am sixty-two years old. I am Senior Partner and Executive Head of the firm of J. E. Sirrine & Com-

(186) pany, Designing and Consulting Engineers. This business was started in 1902 under the name of J. E. Sirrine and in 1921 was changed to a partnership under the name of J. E. Sirrine & Company. Its principal office has been in Greenville, South Carolina, since 1902. My engineering experience has been as follows: I was graduated from Furman University in 1890 with the degree of B. S. I worked for a year on various surveys as rodman and transitman and in 1891 was employed as assistant engineer on the construction of a sewer system at Orange and Summit, New Jersey. In 1892 I was employed for about a year as Assistant City Engineer of Greenville on the construction of a sewer system. From that time until 1895 I did general engineering and survey work in private practice. In 1895 I was employed by Lockwood, Greene & Company, of Boston, as resident engineer on the construction of a cotton mill in Greenville and remained with them until the Spring of 1902. The last several years of that time I was in charge of their Southern Office and had charge of the construction of a number of industrial plants scattered over the South.

In 1902 I started practicing under my own name, specializing in the design of hydro-electric and steam plants, industrial plants, including cotton mills, warehouses, finishing plants, tobacco factories and other industrial work.

During the period from 1902 to date, the firm of J. E. Sirrine & Company has acted as consulting and designing engineers for many concerns. We have designed a number of hydro-electric and steam plants, many of them located in South Carolina, and have also designed and built many miles of transmission lines. In addition to this we have acted as consulting engineers for some of the large power companies in the design and construction of both hydro-electric and steam plants. We have acted as consulting and designing engineers for a very large percentage of the South's equipment in cotton manufacturing and dyeing, bleaching, printing and finishing, and in approximately one-half of its tobacco output.

Among the hydro-electric and steam power plants which we have designed are the following:

(187) Rebuilding Portman Shoals, including Dam and burned Powerhouse;
Dam and Power Plant for Appalache Mills, Arlington, S. C.;
Dam and Powerhouse, Belton Power Company, Belton S. C.;
Dam and Powerhouse, and Steam Plant for Albany Power & Mfg. Co., Albany, Ga.;
Dam and Powerhouse, Gaston Shoals Plant, near Gaffney, S. C.;
Lonsdale Mill—Hydroelectric Plant—Conneross Creek, near Seneca, S. C.;
Dam and Powerhouse on Savannah River at Gregg Shoals, for Savannah River Power Co.;
Two Dams and Powerhouse for Reedy River Power Company, at Boyd's Mill and Tumbling Shoals;
Cliffside Mills—Hydroelectric Power Plant.

In addition to these we have made numerous improvements and additions to water wheel equipments at various industrial plants in several States of the South, and have designed and installed probably a hundred steam plants for various clients, including some utilities.

In collaboration with Mr. W. S. Lee, we acted as consulting engineers for the repair of the Greenville Water Works earth dam after the damage caused by the failure of the drain line under this dam.

Some of the transmission lines which we have designed and built were as follows:

Gaston Shoals to Spartanburg	30 Miles
Berry Shoals to Tucapau	6 Miles
Conneross Creek to Seneca	7 Miles
Ware Shoals—Hydro Plant to Mill	2 Miles
Albany Power Company	3 Miles
Belton Power Company	17 Miles
Reedy River Power Company	13 Miles
Savannah River Power Comapny	25 Miles
Easley to Pickens	11 Miles
Appalache to Victor	2 Miles
Republic Cotton Mills to Great Falls	5 Miles
Distribution Lines in Towns and Industrial Villages, approximately	300 Miles

(188) I am a member of the American Society of Civil Engineers, American Society of Mechanical Engineers, and the American Institute of Electrical Engineers.

About a year ago we were employed by the plaintiffs to look into the proposed Buzzard Roost hydro developments in Greenwood County. We collaborated first with Johnson & Roberts on report, and then they asked us to make an independent investigation of the project, which we have done. I would like to say here that the detail work has been done by several members of our organization, principally on the electrical work by Mr. George Wrigley, who is head of our electrical department, and is an engineer of wide experience in this field, and all estimates in connection with hydraulic structures, railroads, roads, and so forth, have been made by Mr. W. G. Perry, Jr., who is a civl engineer of wide experience in work of this character. I have been in frequent conference with them, examined their figures as they were being made, and satisfied myself of the soundness of the method they were using, and am also satisfied that the results are correct.

PROJECT AS PROPOSED BY GREENWOOD COUNTY ENGINEERS

Under my direction the Sirrine organization has made a very careful study of all features of the proposed development, and we find that the project as outlined in the application is defective in that:

Mr. D. W. Robinson: At this point, Mr. Master, I want to interpose my objection to any testimony with regard to the cost of the project, with regard to the safety of the dam, with regard to the available power, with regard to the operations costs, upon two grounds: First, that these matters are not subject to review in this proceeding, and, second, upon the ground that the Duke Power Company, having urged these questions unsuccessfuly before the Public Works Administration, is estopped to raise the question again. Mr. Haynsworth, I will ask that that objection go throughout the testimony.

Mr. Haynsworth: That's perfectly satisfactory.

(189) Witness continued:

(a) The cost of the proposed development will be greatly in excess of the funds provided by the P. W. A. loan and grant.

(b) If constructed according to plans furnished prospective bidders, the project will be a menace to life and property below the dam.

(c) According to the application to the Federal Power Commission, dated September 8th, 1934, "The project will sell approximately 30 million K.W. Hrs. yearly of primary power, and 20 million K.W. Hrs. yearly of secondary power". Our calculations show that this power production is overestimated, and that the Buzzard Roost Hydro Plant will produce only approximately 28,000,000 K.W. Hrs. yearly of primary power, and 14,000,000 K.W. Hrs. of secondary and dump power. It should be noted that this is the estimated possible production of the plant, and is not the amount of power that can be sold under actual operating conditions.

The defects in estimate and design are as follows:

1. Insufficient land is provided for the reservoir, and the cost of land is underestimated.

2. Cost of clearing reservoir is underestimated.

3. Cost of Highway, Railroad and Wire changes is underestimated.

4. The "Fuse Plug" emergency spillway is a hazardous plan for disposing of floods.

5. The earth dam, as designed, will require large maintenance expense after completion.

6. The riprap shown is insufficient in both extent and thickness.

7. The rock fill toe is inadequate.

(190) 8. No provision is made to protect the downstream slop of the dam from erosion.

9. The flood gates provided are insufficient.

10. The approach channel to the power house and spillway is too small, and will result in excessive velocities during floods.

11. The foundation for the spillway is doubtful, and increased excavation and concrete costs may be encountered after construction is begun. The County Estimate of Class "A" concrete in the spillway is in error.

12. The proposed method of excavating the tailrace is not practicable and will result in production loss to the plant and maintenance cost for years to come, and damage to property below.

13. Both earth and rock excavation quantities are underestimated by the County Engineers.

14. The main transmission line is underestimated in price.

15. Rural lines are underestimated in price.

16. Transmission easements and rights of way are underestimated.

17. No provision has been made in contracts or estimate for operatives village, store house, shop, materials and supplies, etc. The above items are discussed in more detail below. Where reference is made to the "County Estimate", such reference is to the estimate included in the application to the Federal Power Commission, under date of September 8, 1934. Taking up these matters more in detail:

1. Land for Reservoir—The County Engineers propose to purchase only the actual flooded area, plus a fifty foot strip around the reservoir, plus a small area for the power plant site. This is inadequate. In our opinion it would be impossible to purchase all of the

(191). land on this basis, and if the land could be so purchased the project would be liable to numerous and expensive law suits in the future.

The County Engineers estimate 12,566 acres at $17.50 per acre or a total cost of $219,905. We consider that the minimum amount of land necessary will be 18,000 acres, or about one and one-half acres for each acre of reservoir as compared with two acres, which has been the experience of most power companies in this territory. In our opinion the cost of $17.50 per acre estimated by the County Engineers is also too low. While a portion of the land may have been optioned at this price, there are always certain tracts of land which cannot be purchased without strong opposition and even legal action. Prices for such land are usually high and tend to run up the average cost of land acquired for the development. We are including in our estimate $22.50 per acre, which includes the cost of acquisition, recording, abstracting, etc. This will amount to $405,000, which is $185,095 more than estimated by the County Engineers.

2. Clearing Reservoir—The County Engineers estimate $30 per acre for an estimated wooded area of 5.959 acres, or a total cost of $178,770. They propose to clear only above elevation 410. Since the river banks in the lower half of the reservoir range in elevation from 390 to 400 this would leave all timber along the river standing in water. This is contrary to State Board of Health requirements. Also this standing timber, much of which is large, would immediately die and would eventually be a serious hazard to the railroad and highway crossings. All floods must be handled through gates only 38′ in width. If this large timber is left standing in the reservoir it must eventually float out and it could easily obstruct these flood gates and might possibly result in the destruction of the entire earth dam. The clearing cost of $30 per acre of wooded area is also insufficient. The Buzzard Roost reservoir must be cleared, under P.W.A. requirements, with forty cent labor.

Approximately 8,000 of the 12,000 acres of reservoir at Buzzard Roost is wooded and we have estimated this

(192) 8,000 acres at $50 per acre, or $400,000. This is $221,230 more than the County estimated. We consider this a minimum figure.

3. Highways, Railroad and Wire Changes—Both railroads cross Saluda River on steel main spans, with wood trestle approaches. The S.A.L. railroad crosses Cane Creek on a wood trestle. All of these structures will be wholly or partially submerged by the construction of the proposed dam. In estimating the cost of the S.A.L. crossings we have figured on raising the Saluda River Bridge in place and on substituting concrete piers and steel girder spans for the present wood trestle. We have also considered flattening the slopes of all fills to a 2½ to 1 slope and of riprapping these fills as a protection against wave action. For the S.A.L. Cane Creek crossing we have considered relocating a section of the railroad in order to shorten the crossing. This is a much cheaper solution than raising the track on the present location and rebuilding the present trestle. The new trestle at Cane Creek would be of concrete piers and steel girders. The C. & W. C. Saluda River crossing we treated in the same manner as described for the S. A. L. crossing. The estimates for all of these crossings contemplate the most economical construction that should be permitted for safe operation under the changed conditions brought about by the raise in water elevation. The Cothran Bridge on State Highway No. 7 consists of a steel main span with concrete bent and concrete deck approaches.

We have estimated raising the bridge and approaches six feet. In determining the cost of the Reedy River crossing we have assumed that since the new crossing would be an improvement on the present structure the State Highway Department would probably be willing to assume one-half of the cost of the improvement, and therefore only one-half is charged in our estimate. The proposed reservoir is crossed by the 100 KV steel tower line of the Duke Power Company from Newberry to Greenwood. The reservoir as planned will partially submerge seventeen towers on this line. It will be necessary to relocate approximately three miles of this line in order to obtain a span of practicable length. The South-

(193) ern Bell Telephone line change also requires a relocation and the estimate for this has been furnished us by Engineers of the Bell Telephone Company. Following is our estimate of the various changes described above:

Mr. D. W. Robinson: We object, Mr. Master, to the introduction of the estimate of the Southern Bell Telephone Company, on the ground that it is hearsay testimony.

S. A. L. Railroad at Saluda River	$220,000
S. A. L. Railroad at Cane Creek	$100,000
C. & W. C. Railroad Saluda River	$193,000
State Highway #7 at Saluda River	$47,000
½ cost of Highway #10 at Reedy River	$13,500
Duke Power Co. 100 KV Transmission Line	$44,500
Southern Bell Tel. Lines	$6,000
TOTAL	$624,000

The total of $624,000 represents an increase of $468,598 over the County estimate of $155,402.

4. Fuse Plug—In addition to the four flood gates, which are inadequate for the maximum flood which might be expected, the County Engineers propose to build a so-called "fuse plug". It is presumed that in case of an excessive flood, this dyke would be overtopped, and washed out, and the 200 foot channel would act as a spillway. The construction of this "fuse plug" channel is a dangerous solution of the flood control problem. Once water had started through this channel with ample fall below, and with a 12,000 acre reservoir above the extent of the material it would remove would be serious. Even if the rock elevations shown on the plan are solid ledge the reservoir could be drawn down to elevation 415 and this vast quantity of water would be discharged into the Lexington Reservoir at a time when the flood discharge facilities of the Lexington Plant would already have been taxed to the limit. As an example of what might be expected to follow in the giving away of this "fuse plug", I cite an instance that came under my observation during

(194) the flood of 1908 at a small plant on Reedy River, at a site known as Boyd's Mill. This plant was under construction and a low place on the side of the hills above the power plant, which was several feet in elevation above the spillway, had not been filled in. During the flood water got over the "saddle" and while it was a small pond and this hillside was apparently firm ground, it resulted in a break several hundred feet wide and about thirty feet deep, carrying the erosion down to the level of the river bed. It is reasonably certain that if and when this "fuse plug" went out it would result in a long shut-down and the replacement of the eroded material would cost more than the additional gates which we suggest.

Even a small discharge through this fuse plug channel would wash out a three or four hundred foot section of the Greenwood-Newberry highway.

5. Earth Dam—The earth dam proposed is to be of rolled fill in the middle third, with upper and lower slopes loosely dumped. If built as planned, this fill will be subject to settement in the outer sections for a number of years, and if the original cross section (which is not too heavy) is to be maintained, additional earth will have to be placed on both upstream and downstream slopes. This would of course cover up the riprap and sodding, and would be more expensive than placing this material during construction. Our estimate contemplates placing sufficient material to allow for settlement, and the result is 558,540 cubic yards as compared with the County estimate of 531,513 yards.

6. Riprap—The County plans show a twelve inch thickness of riprap extending from elevation 445 to elevation 425. This is insufficient in both thickness and extent. We are estimating riprap of two foot thickness extending from elevation 450 to elevation 418. This results in 12,650 cubic yards as compared with 4,136 cubic yards estimated by the County Engineers on the revised plans as submitted to prospective bidders.

7. Rock Fill Toe—We consider it necessary to place this toe on the surface of the ground as it stands, and to build the toe above normal flood level.

(195) 8. Planting of Sodding Down-Stream Slope of Dam—Our estimate for this is 20,448 square yards at twelve cents, or $2,454.

9. Flood Gates—The plans provide for four Taintor Gates, 38′ wide by 25′ high, to care for floods. As discussed above under the "fuse plug", these four gates would not handle the extreme flood that might be expected. We consider this "fuse plug", a hazardous method of construction and are considering that six gates of this size will be necessary for safety. This of course will increase by about 50% the cost of flood gates, and will also increase the cost of excavation and concrete for the spillway. Our estimates as shown are based on a six gate installation.

10. Powerhouse and Spillway Approach Channel—The approach channel as planned is inadequate in cross section, and the side slopes are too steep for stability. During a flood of the 1908 intensity the velocity in this channel would be about nine feet per second, while it is recognized that velocities in earth channels should not exceed four to six feet, depending on the nature of the material.

We consider the minimum requirements to be a channel capable of handling the 1908 flood with a velocity of six feet per second. This results in a waste of about 65,000 yards of material. If the channel is built as planned by the County, there would be danger of erosion on the steep banks, and serious slides might occur.

11. Spillway and Foundation—Records of drillings in the spillway area indicate that there is serious doubt if sufficiently solid rock will be found at depths planned by County Engineers. Our estimate of quantities of both excavation and concrete are based on carrying excavation here only to the approximate depth shown by the County drawings. If and when this project is constructed we think it very probable that it will be found necessary to carry foundations to a much greater depth than is estimated. Due to lack of more complete information on this foundation we are unable to make an estimate of such quantities.

(196) The County estimate as furnished bidders in Contract #4 calls for only fifty cubic yards of Class "A" concrete in the spillway section.

12. Tailrace Excavation—Plans show that the County Engineers plan to excavate a channel only 25' wide and 8' deep from the power house site to the river, a distance of about 1300'. Presumably they will depend on the water diverted during construction, or upon water discharged by the wheels after the completion of the plant to wash out the remainder of the tail race. In our opinion this method will not secure the desired results. It will be necessary to excavate the entire channel. This material, together with excess material from the approach channel must be wasted. The total yardage to waste is 238,500 yards, which we estimate at twenty cents per yard, or $47,700.

13. Earth and Rock Excavation—The County Engineers estimate as submitted for bids on the general contract shows 10,000 yards of earth excavation and 30,000 yards of rock excavation for the spillway, power house, switching yard and tailrace. These quantities are in error for the four gate installation. As planned, and with foundation carried only to the depth shown on the plans, we estimate approximately 34,000 yards of earth, and 48,000 yards of rock, or an increase of 24,000 yards in the earth and 18,000 yards in the rock.

For the six gate installation, which we consider necessary, we estimate a total of approximately 53,000 yards of earth and 66,000 yard of rock.

14. Main Transmission Line—The license application contemplates single poles set at 600 foot spacings To properly withstand glaze and wind conditions these poles would need to have a circumference of 56" at the ground. Estimated cost, including clearing of right-of-way and switching bents—$281,562. The 44,000 volt transmission system is planned as a loop. Considering the moderate voltage of 44,000 and the 84.3 mile length of this loop, it is an inadequate design. If the fault should occur between the power plant and Greenwood

(197) during the heavy operating hours, with all primary and secondary load in operation, the drop around the line by way of Newberry and Laurens to Greenwood would exceed 29%, which would mean unstable and unsatisfactory operation.

The estimated cost of step-down transformers stations contemplates the use of oil circuit breakers for all of the larger stations and voltage regulators for stations at Newberry, Laurens and Greenwood, and for the rural system. All this is in accordance with the diagram submitted in the application to the Federal Power Commission. The total estimated cost of all step-down substations is $187,237.

15. Rural Lines—The County estimate for the 100 miles of rural lines is $100,000. We estimate this rural line cost for 100 miles at $199,800, which includes the high voltage line, transformers, secondaries, house service, leads and meters. This is based on a 3 phase, 11,000 volt system as stated in the application.

16. Transmission Easements and Rights-of-Way—Even if the rural line right-of-way, is donated, the legal and agent's costs in connection with the right-of-way could hardly be less than $30 per mile, or $3,000. A cross country right-of-way must be acquired for the 44 KV line which connects the power plant with Greenwood, Ninety Six, Newberry, Clinton, and Laurens. We are making for this right-of-way a minimum allowance of $500 per mile, this to cover all costs in connection with acquiring and recording the right-of-way deeds. On this basis we obtain a total cost for rights-of-way on the 84.3 miles of 44 KV line and the 100 miles of rural line of $45,150.

17. Operators Village—The estimate shown in the application to the Federal Power Commission had no item covering the cost of operators' houses, warehouse, shop, trucks, or other maintenance equipment. So far no provision has been made for these necessary items in contracts advertised by the County. For these we estimate a minimum cost of about $22,000.

(198) ESTIMATE OF COST: Our estimate of cost, based on the four gate installation with fuse plug amounts to $3,999,687.

For the six gate installation, which we consider necessary for safety, the estimate is $4,245,379. Prices used in this estimate are taken from the low bids already received by Greenwood County on such items as have so far been covered by such proposals. On items not so far covered we have estimated unit costs. Quantities shown in the estimate were determined by us after a careful examination of the plans prepared by the County Engineers. With the exception of engineering, the general overhead costs carried in our appraisal are practically the same in amount or in percentage as those shown by the County Engineers in their estimate as submitted to the Federal Power Commission. The engineering we have calculated at 6% of the total cost of the project, as fixed in the contract between Greenwood County and their engineer, Mr. D. T. Duncan. In our opinion this estimate is conservative, and the project if properly and safely built will cost at least the amount determined in this estimate.

POWER PRODUCTION AND SALE

With a view to determining as accurately as possible the amount of primary and secondary power which the Buzzard Roost plant as proposed might be expected to produce, we have made a thorough study of all available stream flow records for a period of 38 years.

Our studies indicate that the plant will produce approximately 28,000,000 KWH of primary power and 14,000,000 KWH of secondary and dump power. Since this project is to have no other source of power they should not contract for delivery of power in excess of the above amount.

While the theoretical probable production of the plant is as stated above, it will be impossible to sell power in this amount. Business conditions will not at all times permit customers to use the full amount of power contracted for. It is the experience of all power companies

(199) that the power sold and collected for is always less than that contracted to be sold. It is our opinion that not more than 90% of the amount of power stated above will be sold and paid for, and we are estimating the production and revenue on this basis. This estimate shows that the project can probably sell 25,524,000 KWH of primary power for a total of $218,141, and 12,711,600 KWH of secondary and dump power for $47,777, giving a total revenue of $265,918. As to the operating cost, we have estimated that the project will have to pay taxes on property outside of Greenwood County, but we have not included any allowance for hydro generating tax.

Our estimate of taxes on property outside of Greenwood County, exclusive of land, is $35,946 per annum; taxes on 9,000 acres of land at 20 cents, $1,800. Insurance liability and employees—6% of payrolls, $2,260, and $260 for fire insurance.

Maintenance, which includes supplies and ordinary repairs, $16,000. Wages, $38,680. Office rent telephone and supplies, $420. Traveling expenses and miscellaneous $2,400. Reserve for depreciation and betterments, as provided in the contract with the P. W. A., $60,000. Interest and capital retirement at .0578, $205,953. The total is $363,729.

In order to make the Buzzard Roost project self-liquidating and self-supporting the rates at which the County proposes to sell power would have to be increased about 44% for the primary power. I do not believe the rates for secondary power could be increased. This increase in rates would have to be made even with the County having the benefit of the grant the federal financing, and the tax exemption on all property in Greenwood County. The market for secondary power is quite limited unless the rate is extremely low. I understand that the County has a contract with the Panola Mills but I do not think there is an opportunity to sell any other secondary power in that territory unless the rate be very low.

If the County did not have the benefit of a federal loan and grant from the PWA it would not be able to finance this project on the basis of revenue bonds. In the first place the rates would have to be substantially higher than they are, and in the second place, which is more important, they would be calling on the prospective purchaser to take a bond where he had 100% of the risk,

(200) and a limited participation in the profits if there were any. I have been interested in financing several power companies, and I think I have a good working knowledge of the type of security they have to offer to investors. In the absence of federal financing the rates of the Buzzard Roost project would have to be increased to the extent that they would substantially exceed the present Duke rates.

W. G. PERRY, a witness for the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a civil engineer having graduated from Clemson College in 1912. I worked on surveys of various kinds during the summers while I was at Clemson, and upon graduation I was employed as levelman on a Government drainage survey. This job lasted until January 1, 1913, or about six months. I was next employed by the Southern Power Company on transmission surveys and I spent the entire year 1913 on various surveys working as transitman and head of party. About the first of 1914, construction was started on the Lookout Shoals hydro electric plant, located on the Catawba River, at Catawba, N. C., and I was assigned as Assistant Resident Engineer on this job. This development involved a concrete dam about 80 feet high, containing over 200,000 cu. yds. of masonry, and the installation of generating equipment rated at 33,000 H. P. I located the main line railroad to this job and assisted the contractor in his preparatory work such as crusher and mixer plant erection, plant railroad installation, equipment erection, temporary buildings, compressor and pipe line installation, cofferdams, etc. I did all layout work in connection with the dam and power house and worked up all estimates on this job. This work was completed about April, 1916, and I was moved to Fishing Creek Station in South Carolina, which job was then about half completed. This development involved the construction of a concrete dam about 50 feet high, containing about 90,000 cu. yds. of masonry, and the installation of generating equipment rated at 44,000 H. P. There I had charge of the layout work around the power house until the big flood of 1916, when

(201) I was sent back to Lookout Shoals, as Resident Engineer in charge of the repairing of the flood damage. This work consisted mainly of extending the original spillway section and building an earth dam, of about one-half million cu. yds., across a new channel washed out by the flood. This work was still in progress when I left to go in the Army, in May, 1917. I was in the Army for about two years and was commissioned as 2nd and later 1st Lieutenant of the Engineers. I went to France in November, 1917, where, after going to various schools, I was engaged in ranging work with the American Artillery on various sections at the front. I returned from France in April, 1919, and again went to work for the Southern Power Company. After several months of topographic surveys, I was assigned to the construction job at Bridgewater, N. C. This was a hydro-electric power and storage development involving three earth dams containing about five million cu. yds., a concrete dam containing over 100,000 cu. yds., and a power house with an installation of 26,000 H. P. I worked on this job, as Assistant Resident Engineer until January 1st, 1920, when I resigned and went with J. E. Sirrine & Company. I have been with them ever since. My work with Sirrine & Company has been of a wide variety. In addition to industrial buildings, I have handled almost all of the hydro-developments and special foundation work that has come into the office. This included a number of small hydro jobs. I have also visited many large developments in various part of the country. These included several of the newer Duke jobs, the Conowingo job the Norwood job and a number of smaller ones. I have always been particularly interested in hydro construction, and have tried to keep in touch with improved methods of construction. I have worked on many appraisals of various kinds during the fifteen years with Sirrine & Company. During the past four years I have been in charge of all electric property appraisals. During this time, in addition to the Southern Public Utilities Company and Duke Power Company jobs, I have worked on the Carolina Power & Light Company property, and a number of smaller jobs in Alabama and Mississippi and South Carolina.

During August, 1934, Sirrine & Company were employed by the Duke Power Company to make a report on the proposed Buzzards Roost Development of Green-

(202) wood County, S. C. Since that time I myself, and a number of other members of the organization, have been working intermittently on this report. All work in connection with the reservoir, dam, intake canal, power house and spillway, and tail race has been done by myself and by men immediately under my direction. All work in connection with the power house equipment, transformer station, transmission lines and rural lines, substations, and power production estimates has been done by or under the direction of Mr. George Wrigley. All work in connection with all features of this report has been supervised in a general way by Mr. J. E. Sirrine. I have assisted Mr. Sirrine in the preparation of the testimony which he has introduced in connection with the reservoir, dam and other hydraulic structures. This part of the report is correct and I adopt it as my testimony in this case. I refer to the report which he read into the record as a part of his testimony.

GEORGE WRIGLEY, a witness for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a resident of Greenville, S. C., and a member of the firm of J. E. Sirrine & Company. I graduated at Alabama Polytechnic Institute, Auburn, Ala., in 1897, and completed a post graduate course in electrical and mechanical engineering at the same college in 1899. I went in July 1899, with the General Electric Company at Schenectady, and was in the employ of that company until July, 1906, when I went with Mr. J. E. Sirrine in Greenville. During my employment with the General Electric Company, I was in the Test Course, Transformer Designing Department, Commercial Engineering Department and District Engineer of the Atlanta office. In the employ of the General Electric Company, I went to Mexico in 1903, and was there for nine months as Resident Electrical Engineer on the Guanajuato Power Company's hydro-electric plant, long distance transmission line and distribution system.

I am in direct charge of all electrical planning work handled by J. E. Sirrine & Company. This work, in ad-

(203) dition to general industrial designing, has included the electrical installations:—*Hydro-Electric Projects—Complete new plants*: Electric Mfg. & Power Company, Gaston Shoals; Savannah Power Company, Gregg Shoals; Albany Power Company, Albany, Georgia; Belton Power Company, Belton, S. C.; Seneca Light & Power Company, Seneca, S. C.; R. F. Lenhardt, Liberty, S. C.; Reedy River Power Company, Boyd's Mill; and Reedy River Power Company, Sullivan's Shoals. *Hydro-Electric Project—Partial Rebuilding and/or new Equipment*: Piedmont Mfg. Company, Piedmont, S. C.; Enoree Mills, Enoree, S. C.; Cliffside Mills, Cliffside, N. C.; Enterprise Mfg. Company, Augusta, Ga.; Sibley Mfg. Company, Augusta, Ga.; Coolemee Mfg. Company, Cooleemee, N. C.; Conestee Mills, Greenville, S. C., and Norris Cotton Mills, Cateechee, S. C. *Transmission Lines*: Electric Mfg. & Power Company; Tucapau Mills, Pickens, S. C. from Easley, S. C.; Seneca Light & Power Company; and Reedy River Power Company. *Distribution Systems*: More than 65 industrial villages.

I participated in the preparation of the report Mr. J. E. Sirrine has read into the record in this case as part of his testimony. All work in connection with the power house equipment, transformer stations, transmission lines and rural lines, substations and power production estimates, has been done by me or under my direction. Those parts of the report are correct and I adopt them as my testimony in this case.

CROSS EXAMINATION.

With the exception of the Mathews Cotton Mills, which uses some current from Duke, there is no cotton mille in Greenwood County which uses Duke Power. Most of these textile plants have their own steam power plants. Greenwood Cotton Mills, Nos. 1 and 2 have old Corliss engine steam plants; Mathews Cotton Mill has a Corliss engine plant built about 1912; the Ninety-six Cotton Mills has a steam turbine plant built in 1926; Panola Mills has a steam turbine; Grendel Mill has a steam plant; Newberry Cotton Mills in Newberry County has quite an old steam plant; the Bailey Mills in Clinton, in Laurens County, have a relatively new plant, built in the last year or two; so does the Lydia Cotton Mills. I have heard that these steam plants also furnish electrical

(204) energy for the town of Clinton. The Ware Shoals Mills in Greenwood County have their own power plants, partly hydro-electric, partly steam. Their steam plant was built in several units, from 1918 through about 1930. There are no other mills in Newberry or Laurens Counties using steam that I know of.

I haven't a direct figure in mind, but I can make this statement: that at approximately a load of 2,500 kilowatts at the present price of coal, and assuming a modern efficient steam plant, and assuming its fixed charges, and that it is a condensing plant for power only, the cost is very little different from purchased power. In my opinion it would be practically an even break, for a mill using that much power, between the cost of purchasing the power from the Duke Power Company and the cost of producing it by a steam plant.

RE-DIRECT EXAMINATION.

In making the statement that the cost of producing power by a 2,500 kilowatt steam plant, at the present price of coal, would be approximately the same as purchasing this amount of power from the Duke Power Company at its present rates, I assumed that such a mill would operate regularly. If the mill operated irregularly the cost of a steam plant would be a little higher. The difference would depend upon the extent of operation.

I am reasonably familiar with the textile mills and other industrial plants of the piedmont section of North and South Carolina, particularly that part of the piedmont section served by the Duke Power Company, and know that a great majority of such textile and other industrial plants in this section are served by the Duke Power Company.

C. P. ROBERTS, a witness for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a civil engineer, a member of the firm of Johnson & Roberts, of Marion, South Carolina, and that firm

(205) is composed of Colonel Johnson and myself, as a partnership.

Since this report has been prepared by Colonel Johnson and myself, I will mention some of his qualifications as well as my own. He was the first Chairman of the South Carolina State Highway Commission, and before that time he was Chairman of the Marion County Highway Commission and its Chief Engineer, and built about 100 miles of road and about 30 bridges under the first county bond issue in the State of South Carolina, back in 1908 to 1911. He was also Colonel of Engineers of the Rainbow Division during the War. He was a member of the Boundary Commission in the line dispute between North and South Carolina in 1928 or 1929—I have forgotten the year. Now I graduated from Clemson College in 1910 in civil engineering. For two years after that I was in railroad construction, and built the railroad between Wards, South Carolina, and Saluda, in the general neighborhood of the work that is being done here. I not only did the engineering on that job, but it was built by contract with day labor, and the superintendent died after I went there and I had charge of the entire construction—all of the accounting as well as the engineering, which gave me a better opportunity to arrive at cost prices and things of that kind. In 1912 I went to Marion and since then have been associated with Colonel J. M. Johnson in general engineering and construction work. We have built three major bridges across the Great Pee Dee River, involving clearing and grubbing, earth work, steel and concrete, and practically all of the items which are involved in this project. We have also built three bridges across the Little Pee Dee River. We have done the engineering on paving in a considerable number of towns in the lower part of the State. We have done the engineering on four big drainage systems, involving quite a large amount of clearing and of earthwork. For a good many years we have made investigations of the rivers in South Carolina and their floods. In the floods of 1916 and the floods of 1928 and 1929—those principal floods and other floods after those floods, there were *quire* a number of lawsuits for damages on the rivers in South Carolina. We have made investigations for, I would say, somewhere between 50 and 100 of those lawsuits, and have for a long period of years studied in minute detail the flood conditions,

(206) size and necessary openings, and things of that sort, on all the principal rivers in South Carolina. On the Saluda River we spent several weeks studying the floods on that particular river. In 1932 we were with the South Carolina Railroad Commission as consulting engineers in the valuation of the Broad River properties. In 1933, we were with them in valuation work of the Carolina Power & Light Company. In January, 1934, the firm of Johnson & Roberts, of which I am a member, was employed by the Duke Power Company to study and investigate the proposed Buzzard Roost power project. Since that time I have spent a large portion of my time in these studies. Previous to this time we had spent several months in the study of floods in the Saluda River. The U. S. Corps of Engineers had made a study of this project and during the time of our studies published a report on this project along with others in the Santee System. We have used this published information along with considerable additional information compiled by them and not contained in the published report. We have supplemented this information by examinations and surveys made of the plant site and the location of the various roads and railroads crossing the reservoir. We first studied the application of Greenwood County to the P. W. A. and appeared before the Board of Review on July 2, 1934. Since our report and hearing on the plans as then proposed numerous changes have been made in the plans, a number of which were suggested by us.

After carefully studying the present plans and specifications we find that:

No land outside the reservoir is included;

The price of clearing low and a large part of the necessary clearing omitted;

Inadequate provision for by-passing the river during construction;

The amount of rip rap underestimated;

The cost of excess excavation omitted, which may or may not be changeable to the County;

The spillway about two-thirds the necessary capacity with a "fuse plug" which is dangerous;

Cost of secondary lines, transformers, meters and house connections evidently omitted for rural lines;

(207) Poles on main transmission lines too far for uninterrupted service;

The cost of raising roads, railroads, and wire lines greatly underestimated;

The annual operating cost underestimated;

The available power overestimated.

BUZZARD ROOST PROJECT

ESTIMATED COST

Preliminary Costs:			$25,000
Lands			
Reservoir & Plant site	16,800 Ac.	$25.	$420,000
Transmission Right of Way	3,320 Ac.	50.	25,600
Acquisition	84 Mi.	80.	6,720
Rural Lines	100 Mi.	50.	5,000
	Sub-Total		$457,320
Amount of Bids:			$1,191,578
Erection Engineers on Equipment, etc.			8,500
House and Yard Lighting, etc.			3,000
Errors in quantities:			
Earth excavation	$20,912		
Rock excavation	33,527		
Class A Concrete	14,279		$58,718
Changes in Design:			
Top width of dam 20′ instead of 10′ 35,200 c. y. @ .39	$13,728		
Rolling entire dam	17,540		
Riprap	12,186		
Sodding slopes	5,019		
Two additional floodgates	132,883		
Excess earth excavation	10,994		
Tailrace excavation	30,500		$222,850
Total bids with necessary changes— Sub-Total			$1,484,646

(208) *Items on which Bids Have not Been Received*:

Clearing	8,000 Ac.	$40.	$320,000
Substations			213,492
Main Transmission Lines	84.3 Mi.		273,975
Rural Lines	100 Mi.	$1754	175,400
Highways, Railroads & Wire Lines:			
C. & W. C. Railroad	$185,200		
Seaboard RR—River	213,240		
Seaboard RR—Cane Creek	123,355		
S. C. Highway No. 7	33,000		
S. C. Highway No. 10	37,025		
Power Line	45,000		
County Roads & Wire Lines	12,000		$648,820
Operators' Cottages			$10,000
Shop, Testing Equipment, etc.			7,000
Maintenance truck equipped & 2 autos			5,000
Total not covered by bids—			$1,653,687
Total bids with necessary additions—			$1,484,646
			$3,138,333
Preliminary:			$25,000
Land:			$457,320
Construction Costs:			$3,138,333
Engineering:			
6% of Construction and Land	$215,739		
Less Surveying included in Land & Transmission Costs	22,700		$193,039
Legal & Administration:			$75,000
Interest During Construction:			96,200
Contingencies & Hazards—5%			$199,244
TOTAL COST—			$4,184,136

C. P. ROBERTS.

(209) The items covered by bids received to date by the County amount to $1,189,536.22. To this must be added the per diem and expenses of the erection engineers for gates, turbines and electric equipment, the cost of supplying electric current to the contractors during construction, and the cost of wiring and lights for powerhouse and yard. These items will increase the cost approximately $11,500. For the plans and design on which bids were received, the estimated quantities appear to be substantially correct except for the earth and rock excavation in the powerhouse and spillway section and the quantity of Class A concrete in the spillway.

These three errors in the necessary quantities for the plans on which bids were received amount to:

Additional earth excavation	$20,912
Additional rock excavation	33,527
Additional Class A concrete	4,279
	$58,718

The above quantities are calculated to the lines and grades shown in the plans. The probability is that additional rock must be excavated and replaced with additional concrete in order to procure safe foundation.

The designs should be changed as follows: Top width of dam should be increased, the entire fill should be rolled, riprap should be extended and increased in thickness, the dams must be sodded, and the fuse plug should be omitted, and flood gates of sufficient capacity installed. The added width will require 35,200 C. Y. at 39 cents, amounting to $13,728. There is a tremendous difference in seepage through a rolled and unrolled fill. The shrinkage, if excessive, may be dangerous to the safety of the dam. A movement once started may move a much greater mass that would otherwise be stable. All the fill should be rolled. This will cost about three cents per cubic yard and will increase the material required at least 5% both applied only to the unrolled two-thirds. This will make an additional cost of $17,540.

It is necessary to cover the upstream face of the dam with riprap for protection against wave action. Riprap must extend above highwater and below low water, Wave action will be heavy due to the long straight line

(210) of open water in the reservoir. Rip-rap should be placed two feet thick between elevation 449 and 417. This will require 12,260 cubic yards. Only 4,136 cubic yards are provided. The additional amount of 8,124 cubic yards at the bid price of $1.50 will increase the cost by $12,186. The dam must be sodded with bermuda or other grass above the rip-rap, across the top and down the lower side of the dam. The cost will be about 15c per square yard or $5,019.

The most serious defect in the design is the lack of provision for proper spillway for the passage of floods and an attempt to provide proper openings for flood passage by the construction of a "fuse plug". The fuse plug idea is a haphazard attempt to save expense, but with considerable danger attached. The County's plans show four gates and a fuse plug. The Corps of Engineers recommended six gates. When this fuse plug functions as designed, the water will be discharged at a velocity sufficient to move any material except solid rock. The channel will widen and cut down until stopped by solid rock or until the reservoir is emptied. This will artificially increase the height of the flood downstream and place an additional burden on the Lexington dam when it would already be taxed to capacity. The fuse plug is cheap in initial cost, but to deliberately plan to handle floods in this makeshift manner is not exercising due regard for lives and property below the dam. We consider that the "fuse plug" is impracticable and that 6 gates are necessary. The additional cost will be $132,883.

The plans provide for the omission of the tail canal excavation and the construction of a pilot channel only. As this omission of excavating a proper tail race channel will be unsatisfactory and probably more expensive in the first few years of operation, we are including the necessary excavation. This amounts to 122,000 c.y. at 25c, $30,500.

LAND	16,800 Ac. at $25	$420,000

The area of the reservoir at normal full pond is 12,000 acres. Extreme floods will increase the height of the pond four feet at the dam and five or six feet at the

(211) upper end of the reservoir. The County provides for the purchase of the lands flooded at normal water plus a 50 foot strip. Were such a limited purchase possible, frequent high waters would flood unowned lands and would result in many expensive law suits. We know of no record of any reservoir where purchases were confined to the exact flow line. It is our opinion that an absolute minimum purchase outside the reservoir would be 3,600 acres, equivalent to 40% of the area flooded. This is to include area above normal water, and in addition the spillway, tailrace and plant site. We have calculated a cost of $25 per acre to include cost of purchasing, surveys, maps, abstract of title and cost of condemnations, in addition to the amounts paid to the owners. This is less than similar reservoir areas usually cost. Early purchases will probably average less than $25 but later purchases from unwilling sellers will materially increase the average. The easements for main transmission lines will cost not less than $50 per acre for a strip fifty feet wide, plus $80 per mile for costs of purchase, surveys and legal. This amounts to $380 per mile. For rural lines a minimum cost of $50 per mile is allowed for the expense of surveys, obtaining and recording deeds, etc. No allowance is made for payment to owners, assuming that rights-of-way will be donated.

CLEARING	8,000 Acres at $40	$320,000

The government maps and calculations show that 74% of the reservoir is to be cleared. To be conservative we have assumed that only 64% of the reservoir plus a 25 foot strip is wooded and that 36% is in fields. The County omits the clearing in the center of the reservoir in all the area below elevation 410. This elevation is 30 feet below normal full pond. It will not be practicable to leave this area uncleared. The uncut trees will be covered for less than half their height, will immediately die and soon cover a large portion of the reservoir with floating driftwood. This will form an ideal mosquito breeding place of thousands of acres. Except when carried by wind, the flight of the malarial mosquito is supposed to be limited to not more than a mile. The edge of the area proposed to be left uncleared, however, is usually less than two hundred yards from the

(212) shore line. Also, this drift will obstruct the spillway gates and a small flood could easily wreck the dam. The clearing will cost not less than $40 per acre. The cost of clearing is largely common labor, and as the P.W.A. minimum price for common labor is 40 cents per hour, this clearing will be relatively high. Our experience is that clearing costs vary between $60 and $150 per acre.

HIGHWAYS, RAILROADS AND WIRE LINES.

The most serious expense will be in the changing of the railroad crossings. Saluda River and Cane Creek are crossed by the main line of the Seaboard about nine miles above the dam, and the C. & W. C. crosses the river about 13 miles above the dam. Both railroads have steel bridges on masonry or concrete piers, with timber approach bridges.

We have re-estimated the cost based on replacing the timber bridges with steel plate girders on concrete piers. This is not an unreasonable requirement as the timber bridges will be in water averaging 30 feet deep at the Seaboard and 25 feet deep at the C. & W. C., making repairs expensive and rebuilding very difficult. The total for the C. & W. C. is $185,200; for the Seaboard at Saluda River it is $213,240; and for the Seaboard at Cane Creek it is $123,355. We have not included the cost of reinforcing the present river piers, the cost of extra maintenance of the new track or the cost of bond to protect the railroad against accidents.

For the S. C. Highway No. 7 (Cothran Memorial) bridge, it will be necessary to widen the fills to a slope of 2 to 1 and riprap not less than two feet thick. This will cost $33,000. The S. C. Highway No. 10 crossing should be reconstructed at about a cost of $41,400. At Reedy River on S. C. Highway No. 10 the present bridge is 8 feet below water. The present construction can hardly be raised and a new crossing should be constructed at a cost of $32,650. As these crossings would be superior to the present ones, it is our opinion that the S. C. Highway Department should be willing to bear half the cost, leaving a net cost to the project of $37,025.

The Duke Power Company's 100 KV double circuit steel tower line crosses the reservoir about three miles above the dam where the reservoir is two miles wide. (213) Seventeen steel towers are situated in the pro-

posed reservoir. To accord with general practice and this company's method in its own past construction, it will be necessary to rebuild this line with no towers in the water. This will require a rebuild of about three miles with long spans and special conductors at an estimated cost of $45,000.

SUMMARY HIGHWAYS, RAILROADS & WIRE LINES

C. & W. C. Railroad	$185,200
Seaboard Railroad—River	213,240
Seaboard Railroad—Cane Creek	123,355
S. C. Highway No. 7	33,000
S. C. Highway No. 10	37,025
Power Line	45,000
County Roads & Wire Lines	12,000
	$648,820

OPERATORS' COTTAGES, SHOP AND TESTING EQUIPMENT and maintenance truck and service autos. None of these necessary expenses are provided for by the County. We have estimated $22,000 as the cost of minimum requirements. Actual costs will probably double this amount.

OVERHEADS

For Engineering we have used 6% of construction costs and land which is in accordance with Mr. Duncan's contract with the County. For Legal and Administration we have used the County's estimate, plus $20,000 as an increase in legal costs. For Interest we have used the same rate and time on the larger cost. For Contingencies and Hazards we have used 5%.

ITEMS FOR WHICH NO COSTS HAVE BEEN ADDED

SPILLWAY FOUNDATIONS

The plans of construction should not be undertaken

(214) without a very much more thorough investigation of foundation conditions. The least precaution necessary is a reinforced concrete pavement extending 70 feet downstream from the spillway. Investigation may well dictate a very much deeper foundation. Either remedy will greatly add to the cost of construction.

APPROACH CANAL

The velocities in the approach canal are excessive and dangerous. We have not included cost of enlarging.

PASSAGE OF WATER DURING CONSTRUCTION

The provision for the passage of water during construction is inadequate. As planned, there are inherent dangers which must be provided for. We have added no amount in our costs for this expense. The method adopted by the County is inadequate and dangerous with the County definitely assuming the responsibility.

ADDITIONAL TRANSMISSION LINES

Numerous towns and industries are listed as possible customers for the sale of the balance of the available power. Should sales be made to users not situated on the proposed transmission lines no provision is made for the cost of the necessary transmission lines.

TELEPHONES

No provision is made for telephones. A line should be constructed connecting the plant with all substations and with the main office. The cost of these lines is not included by us.

ANNUAL COST

Taxes—Property outside of Greenwood County:	
Structures $1,574,448 x 42% x 47 mills	$31,080
Lands 8,400 acres at 20c	1,680
Insurance, Liability & Employees—5% of Payrolls	1,510
Fire	300
Maintenance, Supplies & Ordinary repairs ½ of 1%	21,200

(215)

Labor		
Plant Superintendent	$2,000	
5 Operators	6,000	
1 Helper	1,000	
Laborers on Maintenance including Mosquito Control	5,000	
Transmission Lineman	1,800	
2 Helpers	2,400	
Meter reader & Repairman	1,800	
Stenographer & Bookkeeper	1,200	
General Manager	4,000	
Legal, etc.	1,000	$26,200
Office Rent, telephone, etc.		360
Depreciation Reserve		67,600
Interest and Capital Retirement—.0578		202,423
TOTAL ANNUAL COST		$350,003

The above interest and capital retirement is based one the contracted amount of the grant of $682,000. Should the P.W.A. furnish the additional funds necessary with the additional grant, the annual cost of interest and capital retirement will be $190,417, reducing the total annual cost to $337,997.

TAXES. We have included taxes on lands outside of Greenwood County at 20 cents per acre, and on property outside the County at 47 mills on 42% of the cost, which is the rate in the school district in which most of the property will be situated.

ANNUAL OPERATING REVENUE

We have carefully calculated the power output of the proposed plant and find the maximum primary available to be 26,650,000 K.W.H. per year. We considered secondary power as power available 18 to 24 months during any 3 year period. The average price for primary power contracts listed in the application is 8.5 mills, while the one secondary contract is at the rate of 5 mills. On the basis of the above amounts and rates corrected for the change in drawdown, the average annual operating revenue will be:

(216)	26,650,000 KWH Primary	at .0085	$226,525
	9,000,000 KWH Secondary	at .005	45,000
	Total Annual Revenue		$271,525

The above is based on the assumption that the County will always have customers to consume 100% of all the primary and secondary power available, an ideal impossible in actual operation. Periods of maximum consumption will not coincide with the periods of maximum water. Customers cannot be added during depressions and dropped during good times. The County cannot depend on an average net annual income of more than 90% of the above or $244,372. It is possible that some dump power will be sold. It is also very unlikely that they will be able to sell 9 million KWH secondary power at 5 mills. That amount I have put to cover the amount that in my opinion they will be able to sell of what is called secondary and dump power combined. I put all the estimated revenue as the revenue on secondary power.

CROSS EXAMINATION.

I am not an electrical engineer, nor is Mr. Monroe Johnson. Our firm has never built a hydro-electric plant nor a dam of any considerable size. We were employed by the Duke Power Company on the Buzzard Roost Project on January 9, 1934; we were also employed by the Duke Power Company to make an investigation of the proposed Santee-Cooper project and we appeared in opposition to that project before the South Carolina Legislature of 1934.

Duke Power Company filed a protest against the Buzzard Roost Project with the Public Works Administration and we attended a public hearing by the Administration in July 1934. I was present during the entire hearing though my senior partner, Mr. Johnson testified with regard to the engineering matters.

We prepared a report on the cost of the project for the Duke Power Company in May 1934, showing the cost of the project as $3,667,499. A copy of this report was filed with the PWA at the hearing in July 1934. The plans on which this estimate were made and the plans

(217) submitted by the County to the Federal Power Commission were different. You might say the plans were based on two different systems. In our report of May 1934, filed with the Duke Power Company and with the Public Works Administration, we estimated $377,441 for raising and rerouting highways, railroads and power lines, which I have estimated at the present time at $648,820. The difference between these costs is due principally to the substitution of steel for timber in the railroad bridges. In my opinion the amount of land which the County would require for the project would be at least 16,000 or 17,000 acres. The form of option used by the County expressly says that the purchase price does not include improvements, does not include crop damages, and on several of them there are other reservations. The options do not include the dam site, particularly on the Newberry side. Most of the options have expired. It is always our experience in matters of this kind that the first lands purchased are always cheaper than the last. The last ones are higher.

RE-DIRECT EXAMINATION.

The price you have to pay for the land is quite different when it is necessary to buy a certain piece of land and the owner knows it is necessary for you to have that piece, than it is where you are purchasing land from an owner willing to sell, and if you cannot get one piece you can take another. When you are purchasing land for a hydro-electric development, such as the Buzzard Roost project, you have to purchase a particular tract of land and no other, and that makes the price you have to pay far higher. The reasons the price goes up as you go along is that you usually buy the cheap land first and deal first with those who are willing to sell.

Referring to my report of May 1934, in which the estimated cost of the project was given at $3,667,499, and my subsequent estimate of the cost, between the dates of these estimates changes were made in the County's plans. The work to be done in the different plans of the County is different, and, of course, the estimates are different, but where the items are the same they are in almost every instance priced at the same amount. The

(218) report of May 1934 contemplated a project which would be confined to Greenwood County alone, with a powerhouse and spillway at a different location from the one now proposed, and in many other particulars the project then contemplated is entirely different from the one now proposed.

We changed our estimates for the railroad bridges and tracks from timber to steel for this reason. At the time we made our May report, we had not discussed the matter at all with the railroads as to what their requirements would be, and we were, to a large extent, misled by the fact that the railroads had made up some estimates for the County on timber bridges. And with this in view, we didn't want to say that the railroads wouldn't accept timber bridges. In our opinion, they should not do it, and it is not proper engineering to do it, but the County had estimates on the timber bridges from the railroads and with that facing us we did not want to say that the railroads wouldn't accept timber bridges. The estimates from the railroads to which I refer are the estimates contained in Mr. Willoughby's letter of November 14, 1933, to Mr. Duncan and Mr. Faucette's letter of November 17, 1933, to Mr. Duncan. It would not be suitable for the railroads to use timber trestles under water. In my opinion the bridges should be on concrete piers on that portion that is in the water. The Highway Department almost entirely uses concrete pile and concrete piers. They use very little timber. In water it is very much more important for railroads, with heavy loads, than it is for a highway.

The bids which have been received by the County relate to those parts of the work on which there was very little difference between our estimates and the estimates of the County. No bids have been received on the items on which there was a material difference in the estimates of cost.

The difference of about $61,000 between Mr. Duncan's original estimates and the bids received is due to the following:

(1) The omission in the bids of services of erection engineers and of the lighting system.

(219) (2) The substitution of cheaper gates and the omission of rakes for trash racks.

(3) Errors in quantities.

(4) Substitution of cheaper construction for earth fill.

F. H. COTHRAN, a witness for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am engaged in the business of Consulting Engineering and have had 35 years of continuous engineering and construction experience. Beginning in 1899, the major engagements have been as follows: Rodman, draftsman and instrumentman, beginning with the Southern Railway and later with Seaboard Air Line Railway through 1899 and 1900. With the U. S. Geological Survey as primary levelman during 1901. Assistant Engineer Cranes Nest Coal Company for a part of 1902. Remainder of 1902 as engineer in charge of a railway survey party, South and Western Railway (now Carolina, Clinchfield and Ohio Railway). Resident Engineer Virginia-Pocahontas Coal Company, 1903, in charge of the Coalwood West Virginia Development. Assistant locating engineer and later resident engineer Coal and Coke Railway (later owned and operated by the B. & O. Railway), assisted in the location of about fifty miles of this line, and had charge of the construction of a heavy residency including a tunnel and several bridges. Between 1905 and 1908 was locating engineer and later engineer in charge of several locating parties with the South and Western Railway; made the location of some of the heaviest work on this line. From 1908 to 1911 made location of the proposed Bristol & Kingsport Railway, the proposed Atlanta Northeastern Railway, also participated in general engineering and contracting practice. From 1912 to 1914 was employed by the Piedmont and Northern Railway as locating engineer and as Division Engineer in charge of construction. Had charge of the construction of the second division (Char-

(220) lotte to Gastonia) and of the third division (Greenwod to Spartanburg) of that line. During 1914 was engaged as engineer in charge of field surveys Quebec Development Company on the Saguenay River in the Province of Quebec. This work included railway, land topographic, and hydraulic surveys for large hydro-electric projects. During 1915 was engaged as engineer in charge of field surveys of a large part of the Catawba River Valley. During 1916 to 1919 was resident engineer in charge of the Bridgewater development of the Western Carolina Power Company. This project involved the construction of four large earth dams, a tunnel and a power plant along with appurtenant works including fifty miles of highway, and revision of the C. C. and O. R. R. bridge, fills and culvert. After July, 1916 flood, had charge rebuilding Lookout Shoals Dam, which was damaged by blowout of the earth dam "fuse plug". During part of 1919 and through 1922, I was employed as division engineer—Southern Power Company, during which time I had charge of numerous jobs including 45,000 K.W. additions to the Mount Holly and Eno Steam Plants, the construction of a pumping plant for the City of Charlotte, N. C., the reconstruction of the Rozzells Ferry Highway Bridge, and the maintenance of the Bridgewater earth dams. From 1922 to 1926 was Vice-President and General Manager of the Alma and Jonquierre Railway, the Quebec Development Company, and the Duke-Price Power Company. This work involved the construction and operation of a short line railway and the construction and placing in operation of a large hydro-electric plant and transmission system, (545,000 H. P.). This work included the construction of an earth dam, mansonry dams, a power plant, highway construction and additions to the Canadian National Railway necessary to its protection from the impounded waters. During this period had charge of preliminary construction incident to the building of the Chute-A-Caron—Shipshaw Hydro-Electric Development (ultimate—1,000,000 H. P.) including a seven mile extension of the Roberval-Saguenay Railway to the works. Also organized the engineering and construction force and had charge of construction of the Arvida, P. Q., Canada, Plant of the Aluminum Company of America.

From 1926 through 1928 was engaged as Chief En-

(221) gineer of the Piedmont & Northern Railway. Had charge of the location and preparation for construction of approximately one hundred and fifty miles of railway.

I also negotiated with the C. & N. W. Railway for the revision of their line made necessary by the construction of the Oxford reservoir of the Southern Power Company on the Catawba River, and was in charge of this construction. I also had general supervision of the reconstruction of the City of Greenville Water Supply dam after its partial failure.

From 1928 through 1932 was engaged as Vice-President, General Manager and Chief Engineer, Beauharnois Construction Company. This company contracted for and carried out the design, construction and placing in operation of the Beauharnois Light, Heat & Power Company's development on the St. Lawrence River. This work involved the building and placing in operation of a very large hydro-electric development, 2,000,000 H. P., ultimate, including earth dams, both of the rolled fill and hydraulic type, concrete dams, power plant, the relocation of the Canadian National and New York Central Railways, as well as highways, etc.

During 1933, was engaged as consulting engineer by the Beauharnois Light, Heat & Power Company. From 1933 to date have been engaged as consulting engineer on various projects in Canada and the United States.

To date, I have had charge of construction involving a cost of nearly 100 million dollars, most of this in hydro-electric projects.

Am a member of the following engineering societies:

American Society of Civil Engineers,
Engineering Institute of Canada,
The American Railway Engineering Association,
Corporation of Professional Engineers of Quebec,
Registered Engineer in North Carolina.

I was engaged about the middle of August 1934 to check into the proposed Buzzards Roost Project and since that time I have made studies and computations to determine the cost of constructing the project as outlined in the application of Greenwood County to the Federal Power Commission, and as revised in the plans and specifications incorporated in contracts 1, 2, 4 and

(222) 5 submitted by Greenwood County to contractors for the purpose of obtaining bids on this project. I have also calculated the primary, and the secondary and dump power available and have estimated the annual revenue and the annual operating expenses and capital charges. In these studies and calculations I have, wherever possible, given the project the benefit of the doubt, consistent with sound engineering.

I was assisted in my studies of this project by Mr. N. F. Noyes, an engineer with over twenty years experience in engineering construction work, mainly of hydro-electric power projects, by Mr. D. Nabow, Designing Engineer of the Duke Power Company who has had over eighteen years experience in the design of power projects, both hydro-electric and steam, and by Mr. M. R. Kimbrell and Mr. F. W. Lachicottee, both electrical engineers of long experience.

As outlined in some detail in the following report I find that:

1) To construct this project, with reasonable safety to the structures and with reasonable protection to property both upstream and downstream, will cost at least $4,085,451. This is $1,318,451 in excess of the $2,767,000 estimate of cost, given in the Greenwood County application.

2) The average annual cost of this project including the cost of operation and maintenance, property taxes outside of Greenwood County only, charges to depreciation and betterment reserve, interest, and capital retirement charge to make this project self liquidating, will be not less than $341,881 on the basis of a grant of $682,000 and exemption from all other taxes.

3) The average annual income from the sale of power over a period of years, will not exceed $252,000. On this basis there would be an average annual deficit of $89,881. This annual deficit can be made up only by increasing the rates for power about 35% if the increase is applied to all power sales, and about 42% if the increase is applied to primary power only.

4) If Greenwood County were not the beneficiary of

(223) the $682,000 grant from the Federal Government, the annual deficit would be increased by $39,420 to $129,-301 per year. To make up this increased deficit the average rate for all power would have to be increased over 50%. If only primary power is increased, a raise of 61% would be required.

F. H. C.

EXHIBIT #1

BUZZARDS ROOST PROJECT

SUMMARY OF COST OF DEVELOPMENT

	Unit	Quantity	Unit Cost $	Total Cost $
1) Preliminary	L.S.			7,000
2) Land				
a) Reservoir	Ac.	18,000	20.00	360,000
b) Easements—Transmission Lines	Mi.	84.3	400.00	33,720
Rural Lines	Mi.	100	25.00	2,500
3) Clearing Reservoir	Ac.	7,500	50.00	375,000
4) Relocation of Railroads, Highways and Wire Lines				
a) C. & W. C. Railway Crossing	L.S.			189,430
b) S. A. L.—Saluda River Bridge	L.S.			195,700
c) S. A. L.—Cane Creek Crossing	L.S.			126,275
d) Transmission Line	L.S.			44,100
e) Telephone Line	L.S.			6,000
f) Cothran Highway Bridge	L.S.			17,570
g) Reedy River Highway Bridge	L.S.			13,855
5) Main Transmission Line	Mi.	84.3	3,077	259,391

(224)

	Unit	Quantity	Unit Cost $	Total Cost $
6) Rural Distribution Lines	Mi.	100	1,725	172,500
7) Step-down substations	L.S.			200,000
8) Earth Dam				
a) Clearing & Grubbing	Ac.	11.5	200	2,300
b) Stripping Foundation	C.Y.	6,667	0.50	3,333
c) Core Trench Excav.	C.Y.	42,437	0.35	14,853
d) Excavation for Rock Fill Toe	C.Y.	43,560	0.12	5,227
e) Earth Fill	C.Y.	560,000	0.39	218,400
f) Rip Rap	C.Y.	12,600	1.50	18,900
g) Sodding	S.Y.	23,000	0.15	3,450
9) Excess Excav.—Approach Channel & Tailrace—Earth	C.Y.	280,000	0.20	56,000
10) Rock Excavation	C.Y.	65,000	3.25	211,250
11) Earth Excav. for P.H. and Spillway	C.Y.	51,000	0.65	33,150
12) Spillway Concrete	C.Y.	9,230	13.58	125,343
a) Reinforcing Steel	Lbs.	100,000	0.045	4,500
13) P. H. Blkhd. & Substr.	C.Y.	8,885	13.28	117,963
a) Reinforcing Steel	Lbs.	100,000	0.045	4,500
14) P. H. Superstructure	L.S.			29,000
15) Hydraulic Equipment	L.S.			181,100
16) Electrical Equipment	L.S.			343,900
17) Powerhouse Crane	L.S.			7,100
18) Flood Gates	L.S.			86,250
19) Penstock Gates & Hoists	L.S.			17,050
20) Trash Racks	L.S.			4,400

	Unit Quantity	Unit Cost $	Total Cost $
21) Walkway on Spillway	L.S.		3,600
22) Water Supply System external to P.H.	L.S.		4,000
23) Station Elec. Service	L.S.		3,000
24) Mics. Structures, Equipment & Supplies			
a) Operators Cottages	L.S.		12,000
b) Machine Shop, Office & Transp't'n Equip.	L.S.		5,000
c) Materials & Supplies in Stock	L.S.		7,000
DIRECT CONSTRUCTION COST (Incl. Prel. & Land)			3,525,610
DIRECT CONSTRUCTION COST (Excl. Prel. & Land)			3,122,390
25) Overheads			
a) Engineering	6% of $3,525,610		211,537
b) Legal & Administrative	L.S.		55,000
c) Interest during Construction 4%—9 mos. on $3,525,610+ 211,537 + 55,000minus $682,000 grant			93,304
Sub-Total Cost			3,885,451
26) Contingencies & Hazards			200,000
27) Total Cost of Development			4,085,451

I—COST OF PROPOSED DEVELOPMENT

The following data has been used as the basis for determining the cost of the proposed Buzzard Roost Project, as shown on attached Exhibit No. 1.

a) Application of Greenwood County to the Federal

(226) Power Commission, dated September 8, 1934. (This is referred to as "application" in the following discussion.)

Plans and Specifications submitted by Greenwood County to contractors for the purpose of obtaining bids on several portions of the work.

Based on the costs as shown on Exhibit No. 1, the portion of the work covered by the above contracts represents less than 50% of the total cost of the completed development.

A—ELEMENTS OF COST NOT COVERED BY CONTRACTS.

The following elements of costs of the development are not included in the plans and specifications of the above mentioned contracts.

1) PRELIMINARY

This item is estimated by the County in its application to the Federal Power Commission, at $7,000.00. In the absence of definite data, I have accepted this amount.

2) LAND

a) Reservoir.

The application estimate is based on buying only 566 acres more than the 12,000 acres at normal reservoir level. At the maximum high water level at El. 447.0, the reservoir area would be 14,000 acres, not considering the back water effect. The Bridgewater reservoir, the land for which was purchased under my supervision, has an acreage at normal reservoir level of 6,510 acres and at maximum flood level of 8,345 acres. The power company found it necessary to purchase, for this development, 20,731 acres. This is 2½ times the area at the expected maximum flood level. This is not an unusual condition. The following tabulation for the four latest large reservoir stations built in the Piedmont Section of North and South Carolina, shows that the power com-

(227) panies have found it necessary to acquire, for each reservoir, from 1.9 to over three times the acreage at the normal reservoir level.

Reservoir	Owned By	Normal Reservoir Area	Total Area Acquired	Ratio of Area Acquired To Normal Reservoir Area
		Acres	Acres	
Lexington	Lexington W. P. Co.	52,000	98,209	1.9
High Rock	Caro. Aluminum Co.	16,100	40,740	2.5
Catawba	Duke Power Company	12,455	41,573	3.3
Oxford	Duke Power Company	4,110	11,341	2.8
	Total	84,665	191,863	2.3

There are a number of reasons why more land has to be purchased than is covered by normal water level. During flood periods, the water level upstream of the dam rises to a higher level than at the dam and therefore unowned lands would be flooded if the land has been purchased to only normal reservoir level. Also in most cases, the water level would submerge a portion—in many cases the best portion—of individual farms. In such cases, the portions of the farms cannot usually be purchased for less than the entire tracts. Again, at each creek entering the reservoir, sand bars tend to be deposited. This raises the normal and flood water levels on the creeks and tends to damage the adjacent property.

As a minimum, 50% in excess of the normal reservoir area should be purchased to prevent flooding unowned lands and involving the project in future damage litigations.

The application is based on an average cost of $17.50 per acre. This, it is stated, is based on options which do not cover the entire property and which do not include the cost of acquisition. It is my opinion that as a minimum, the cost of this land, including cost of acquisition, would be at least $20.00 per acre.

b) Easements.

The transmission lines will have to be carried over private property and rights-of-way secured to permit

(228) access for maintenance. The Duke Power Company has two transmission lines which parallel about 75% of the transmission lines proposed by the County. One of these lines from Newberry to Greenwood was built in 1910, and the rights-of-way cost the company $879.00 a mile, including clearing. The line from Newberry to Laurens was built in 1924 and the right-of-way for this line cost the power company $1,687.00 a mile with the clearing and $1,537.00 a mile without the clearing. I have allowed, as a minimum, only $400.00 per mile of transmission line right-of-way, this to include the cost of acquisition and clearing. For the rural lines only the cost of acquisition is included at $25.00 per mile.

3) CLEARING RESERVOIR.

The application proposes to clear a total of 5,959 acres between contour Elevations 440 and 410, and 25 ft. back from the shore line. This is about 75% of the total acreage in the above area. To clear the reservoir in the manner proposed in the application would mean that tree tops would extend above the low water level over a large portion of the reservoir area. This would require the expenditure of additional large sums annually to control the breeding of mosquitoes, or would constitute a nuisance and a malarial hazard to the adjacent communities. This method of clearing would also involve the removal of debris at the powerhouse and at the floodgates for a number of years after the project is completed, thereby increasing the operating cost and presenting a hazard to the spillway structure especially at flood times. I do not consider it necessary to clear the entire area below El. 410, but as a minimum, 7500 acres will have to be cleared to render the reservoir reasonably safe.

The application allows $30.00 per acre for clearing. The Bridgewter reservoir, which was cleared under my supervision, has a normal reservoir area of 6,510 acres of which about 50% was cleared. The actual cost per acre cleared was $38.00 with labor averaging about 22¢ an hour. With the P. W. A. minimum wage scale of 40¢ per hour, this would mean about $70.00 per acre. As a minimum, the cost of clearing the reservoir at the Buzzards Roost Project would be $50.00 per acre cleared. The total cost of clearing the 7,500 acres will, therefore, be $375,000.

(229) 4) RELOCATION OF RAILROADS, HIGHWAYS AND WIRE LINES.

a) C. & W. C. Railway Crossing.

The present C. & W. C. railway bridge, across the Saluda River, consists of two steel trusses on stone masonry piers, with the top of the piers at El. 438, or 2 ft. below the proposed normal reservoir level. The approaches to this bridge consists of about 840 ft. of timber trestles about 30 ft. high. These wooden trestles with their longitudinal and transverse bracings will be submerged to a depth of about 25 ft. at normal reservoir level. This will render it impossible to inspect and to properly maintain this trestle to insure safety in operation. It would also be very expensive to replace any portion of the trestles with the necessary bracings. These timber trestles, under the above water conditions, would constitute an operating hazard and should be replaced with steel girders on concrete piers. At the end of these timber trestles there are, at present, earth fills varying in height up to 20 ft., and about 15 ft. of this height would be submerged at normal level on both sides of the fill. To make these fills stable, under the above water conditions, as well as under flood and reservoir drawdown conditions, it will be necessary to flatten the slopes and to protect them with stone riprap.

To rebuild this bridge and approaches so as to be able to operate with reasonable safety and without excessive maintenance will cost at least $189,430. This cost is based on a net clearance of only 5 ft., from bottom of steel to normal water level. This, in my opinion, is a minimum, based on the installation of 6 instead of the 4 flood gates as proposed by the County. If only 4 gates are installed the bridge would have to be raised higher at a material increase in cost.

b) The S. A. L.—Saluda River Bridge.

The main line of the Seaboard to Atlanta crosses the proposed reservoir about 9 miles upstream of the dam. The Saluda River bridge consists of three plate girder spans on stone and concrete piers with top of the piers at El. 437.7 or 2.3 ft., below the normal reservoir level.

(230) The approaches to this steel bridge consist of about 785 ft., of ballasted deck, timber trestles, about 35 to 40 ft. high. These would be submerged to a depth of 30 to 35 ft. at normal reservoir level. For the same reasons as outlined in my discussion of the C. & W. C. crossing, it will be necessary to replace the timber trestles with steel and concrete construction. Again, as in the case of the C. & W. C. crossing, the approach fills will have to be flattened and protected with stone riprap. To rebuild this bridge and its approaches, so as to be able to operate with reasonable safety and without excessive maintenance will cost at least $195,700. This is based on a minimum clearance of 5 ft. from the bottom of steel to normal reservoir level. This is probably less clearance than should be reasonably provided for this bridge.

c) S. A. L.—Cane Creek Crossing.

The Seaboard also crosses the proposed reservoir at Cane Creek. The present structure at this crossing consists of a timber trestle about 230 ft. long with earth fill approaches. The low point in the approach fills is at about El. 432.0 which is 8 ft. below the normal reservoir level. The economical method of taking care of this crossing would be to relocate on higher ground, about 300 ft. upstream of the present location. A steel and concrete structure should be built over the creek with earth fill approaches having flat slopes and protected with riprap. The cost of this crossing will be at least $126,275.

d) Transmission Line.

The Duke Power Company doubt circuit 100 K. V. steel tower transmission line from Newberry to Greenwood crosses the proposed reservoir about four miles upstream of the proposed dam.

To relocate the transmission line so as to make this crossing reasonably safe and reasonably accessible for operation and maintenance will cost $44,100, not including cost of right-of-way and clearing.

e) Southern Bell Telephone Company Line.

A telephone line of the Southern Bill Telephone Com-

(231) pany crosses the proposed reservoir about a mile upstream of the Seaboard Bridge. It will be necessary for the Southern Bell Telephone Company to rebuild about 1.5 miles of this line at a cost of $6,000.

f) Cothran Highway Bridge.

The Cothran Highway Bridge on S. C. Highway #7, crosses the proposed reservoir about 13 miles upstream of the proposed Buzzards Roost Dam. The present bridge consists of a 200 ft. steel span, 800 ft. of reinforced concrete trestles and earth fill approaches. The side slopes of the present earth fill approaches would have to be flattened and protected with stone riprap to make the fills stable for the water conditions of the proposed reservoir. The cost of flattening and protecting the present slopes, but not including raising the fills would be $17,570.

g) Reedy River Highway Bridge.

South Carolina Highway #10 crosses the proposed reservoir at Reedy River, about 2 miles above its mouth. This bridge consists of 2—55 ft. steel spans, about 300 ft. of wooden trestle and earth fill approaches. The present roadway of this bridge is more than 6 ft. below the proposed normal reservoir level. To rebuild the present one-way bridge with a similar structure and with minimum clearance above the proposed reservoir level will cost at least $13,855.

It is my understanding that the Saluda River crossing of this Highway #10 is no longer a portion of the State Highway system, but has been turned over to Greenwood County. Since the County may decide to abandon this crossing, I have not considered the reconstruction of this bridge.

h) County Roads and Bridges.

There will undoubtedly be a number of secondary roads to be relocated and small bridges to be built on a reservoir of the size proposed in the application. In the absence of definite data, I have made no allowance for this item.

(232) i) Resume.

To summarize, the total cost of the necessary railway, highway and wire crossings will be at least as follows:

C. & W. C. Crossing	$189,430
Seaboard Airline Crossing	321,975
Transmission Line	44,100
Telephone Line	6,000
Cothran Highway Bridge	17,570
Reedy River Bridge	13,855
TOTAL	$592,930

5) MAIN TRANSMISSION LINE.

The application proposes to build about 84 miles of 44 K. V. transmission lines from the powerhouse to Newberry, Clinton, Laurens and Greenwood. To assure reasonably dependable service to the power consumers, it is essential that this one transmission line should be built in accordance with safe and sound standards. The type of construction proposed by the county, being based on 600 ft. space of single poles, does not satisfy these requirements. To properly construct this line, either two pole H frames should be used with the longer spacing, or single poles should be used with shorter spacing. The H-frames would be the more economical of these two types of construction and would cost $3,077 per mile. This does not include the installation of ground wires. The total cost of the main transmission lines will be $259,391.

6) RURAL DISTRIBUTION LINES.

The application proposes the construction of 100 miles of 11 K. V. rural distribution lines and allows for same, a total of $100,000 or $1,000 per mile. This estimate of cost is insufficient. It will cost at least $1,725 per mile to properly construct the 11 K. V. rural distribution lines together with the necessary secondary lines, transformers, meters and other equipment necessary to render service to rural customers. The total cost of the rural distribution lines will not be less than $172,500.

(233) 7) STEP-DOWN SUBSTATIONS.

Since the installed generating capacity is 18,750 K. V. A., it will be necessary to install at least 18,750 K. V. A. of step-down substation capacity to take care of the entire output of the plant whenever there is sufficient water available. The total cost of the 18,750 K. V. A. of required substation capacity will be at least $200,000.

B—WORK COVERED IN CONTRACTS #1—#5 INCLUSIVE.

The items of construction as listed below are included in the plans and specifications forming a part of Contracts #1 to #5 inclusive, and on these bids have been submitted to the County. The low bids submitted by the several equipment manufacturers for the hydraulic, electrical and other equipment have been used as establishing the cost of materials. The unit cost bids as submitted for the general contract, by the low bidder, have been used as the basis for determining the cost of construction wherever applicable.

8) EARTH DAM.

The design of the dam as shown on the contract drawings calls for an unusual type of construction in that it is specified that only the middle third area is to be a rolled fill of selected materials, while both the upstream and downstream dykes are to be built by loose dumping. The use of materials of sharply differing densities in the 3 portions of the cross-section of the earth dam will introduce the problem of unequal settlement, and slides and slips are likely to result from such unequal settlement for a number of years after the dam is completed. In my opinion, the entire fill should be rolled. This would eliminate the dangers of unequal settlement, would increase the resistance to seepage, and would result in a more stable and satisfactory structure. However, if the method proposed in the contract is adhered to, sufficient overfill should be placed to take care of the settlement which will take place after the dam is completed. The contract drawings show that the County proposes to build the earth dam with a 10 ft. wide top. In my

(234) opinion, the 10 ft. top width is insufficient to take care of weathering and erosion. This top width is also insufficient for roadway necessary for maintenance.

At least 34,000 cu. yds. of additional fill should be placed. This overfill would eliminate the possibility of slopes steeper than 3 to 1 upstream and 2-1/2 to 1 downstream, resulting from the settlement of the fill. These slopes are, in my opinion, the minimum allowable for stability. The total yardage that should be placed in the dam, as a minimum requirement for adequacy, would be 560,000 cu. yds. At the bid price of 39c per cu. yd. this item would amount to $218,400.

Riprap.

The contract drawings call for a 1 ft. thick stone riprap extending 5 ft. above normal water level, and 1 ft. below a 15 ft. drawdown level. The bottom of the riprap will therefore be 4 ft. above the maximum drawdown level of 20 ft. while the top of the riprap would be 2 ft. below the maximum highwater level at Elevation 447.0, as shown on the drawings. In my opinion, this is insufficient. To properly protect the upstream face of the earth fill against wave action, the riprap should extend at least 3 ft. below the maximum drawdown level and to at least 5 ft. above the maximum high water level. Also, since hand placing is not specified, a 2 ft. thickness of riprap should be used. This will require 12,600 cu. yds. of stone. At the bid price of $1.50 per cu. yd., this item would cost $18,900.

Sodding.

The application drawings call for sodding the downstream face of the dam. This would cost at least 15c per sq. yd. It is estimated that 23,000 sq. yds., would be required at a cost of $3,450.

Additional Costs.

The contract drawings show that where the earth dam has a maximum section, the rolled core fill is to be taken to rock foundation. Also, at the east bank of the earth dam there are rock outcrops on the surface. It is essential that suitable cut-off be provided at the joint between the earth fill and the rock. This may involve

(235) the cleaning out of seams, excavation of rock and grouting of foundation. The extent of such work can be determined only after the foundation is uncovered, and I have therefore included no additional cost for this work.

I have also made no allowance for the extraordinary maintenance which is normally required during a number of years after the completion of an earth dam.

9-A) SPILLWAY CAPACITY.

The application gives the flood discharge record, at the dam site, as 72,000 c. f. s., in 1908. This is 65 c. f. s. per sq. mi. for the 1,100 square miles of drainage area at Buzzard Roost. The application also estimates the maximum flood, that may be anticipated, at 132,000 c. f. s., or 120 c. f. s., per sq. mi. This is equal to the 132,000 c. f. s., maximum discharge used by the U. S. Army Engineers for the spillway design at the Buzzards Roost site. During the July, 1916, flood, on the Catawba River, the maximum flood discharge at the Lookout Shoals Station, with a drainage area of 1,410 sq. mi., was computed at 181,000 c. f. s., or 125 c. f. s. per sq. mi. In my opinion, the maximum flood discharge of 132,000 c. f. s., as given in the application is certainly not an excessive estimate for design.

The contract drawings call for four Taintor gates, each 25 ft. high and 38 ft. wide. These gates would have a discharge capacity of 70,000 c. f. s. at normal reservoir level. For the maximum flood discharge estimated in the application, and with the four gates fully open, the reservoir level would have to rise 10 ft. above normal or to within 2 ft. of the top of the earth dam, before the discharge will equal the inflow. Considering wave action, this would endanger the safety of the earth dam. The contract drawings, however, call for an earth fuse plug, designed to break and wash out whenever the reservoir level would rise above the top of the earth plug, at El. 445. Should the fuse plug channel maintain its section, as shown on the drawings, the reservoir level for the maximum flood discharge would rise to about El. 447.0 at the spillway, and to about 448.0 at the earth dam, or to within about 4 ft. of its top. This is none too safe.

However, as called for on the contract drawings, the fuse plug channel is not confined on its sides nor is it

(236) carried to rock bottom. Should the earth plug blow out, it would let loose a wall of water 200 ft. wide and about 15 ft. deep. The tremendous energy of this discharge would excavate its own channel of unpredictable width and to hard rock. The contract drawings show several wash borings in the fuse plug area with a rock surface varying from 424 in the fuse plug channel to elevation 415 about 300 ft. away. There is nothing to indicate that this is solid rock. At the Lookout Shoals Station of the Duke Power Company on the Catawba River, the functioning of the fuse plug during the July, 1916, flood resulted in the excavation of two channels about 600 ft. and 200 ft. wide, and about 70 ft. deep below the top of the fuse plug. This practically drained the entire pond, which had a reservoir area of less than 2,000 acres, put the station out of commission for a considerable period of time and involved considerable expense of reconstruction to eliminate fuse plug action in the future. Even if the rock as shown on the contract drawings is solid rock, the functioning of the fuse plug would result in draining the upper 15 to 25 ft. of the Buzzard Roost reservoir, and in superimposing this tremendous volume of water, with its potential force of destruction, on properties downstream, and especially on the Lexington reservoir. The functioning of the fuse plug channel will also tear out a portion of the main highway between Greenwood and Newberry. Since no definite channel is provided for taking this water back into the river, the water will necessarily have to dig its own channel and may result in destruction of property not owned by the County.

I consider the fuse plug a thoroughly impractical solution for taking care of flood water. Two additional floodgates should be installed to permit controlled discharge of the maximum flood. With the six floodgate installations, the maximum flood discharge would be taken care of with a rise in reservoir level of about 4 ft. at the dam. This would give a reasonable margin of safety to take care of such operating contingencies as a gate being out of commission, or other than perfect operation of the floodgates. The lowering of the maximum high water level will also permit more economical revisions of the railroad and highway crossings. The revisions of these crossings as previously outlined are based on the installation of 6 floodgates.

(237) 9) EXCESS EXCAVATION, APPROACH CHANNEL AND TAILRACE.

a) Approach Channel.

As revised on the "general contract" drawings, the approach channel has a bottom width of 200 ft. with 1 to 1 side slopes. The spillway at the end of this channel is provided with four Taintor gates. When these gates are fully open and water at the normal reservoir level at El. 440.0, the maximum velocity in the canal would exceed 9 ft. per second. For the maximum assumed flood condition and with high water at El. 447.0 the velocity in the canal would be almost 11 ft. per second. These velocities are excessive. Even if the channel is excavated through a stiff clay, mean velocities in excess of about 5 ft. per second will result in erosion of the bottom and banks until sufficient area is excavated to reduce the velocity below the erosion limits.

Considering the elimination of the fuse plug channel, and the installation of 6 floodgates, the required total approach channel excavation would be at least 780,000 cu. yds. or about 147,000 cu. yds. in excess of the excavation specified in the contract for the approach channel and fuse plug channel. With this channel excavation the canal velocity would be 5 ft. per second for a discharge of 70,000 c. f. s. (corresponding to 4 gates open with headwater at El. 440). For 5 gate discharge, (87,500 c. f. s.) the canal velocity would exceed 6 ft. per second.

b) Tailrace.

The contract drawings and specifications call for tailrace excavation extending only about 350 ft. below the upstream face of the powerhouse. Downstream of this excavation only a pilot channel 25 ft. wide, about 8 ft. deep, and over a quarter of a mile long is called for to extend to the river. Here again the intention would seem to be to use water discharged from the spillway to complete the tailrace excavation necessary for satisfactory operation of the powerhouse. I believe this method is impractical, and in the long run will cost more than proper tailrace excavation, made in the dry, at the time of the construction of the plant. It is my

(238) opinion that the cross-sectional area of the tailrace should be equal to the cross-sectional area of the present river channel at the dam site. This would require at least 133,000 cu. yds. of excavation for this tailrace.

c) Total Excess Excavation.

The contract specifications do not include unit prices applicable to the excess earth excavation as outlined above for the approach and tailrace channels. At the unit cost of 20c per cu. yd. this item of additional excavation of 280,000 cu. yds. would cost $56,000.

10) ROCK EXCAVATION.

The contract specifications call for a total of 30,000 cu. yds. of rock excavation in the area of the powerhouse, spillway and adjoining channels. Based on the rock contours as shown on the contract drawings, and the typical sections shown for the powerhouse, spillway and abutments, the required rock excavation for the 4 flood gate layout will be at least 47,000 cu. yds. The churn drill and diamond drill data furnished by Greenwood County would seem to indicate that neither the spillway piers nor the cut-off walls, nor possibly the spillway proper as shown on the drawings, have been carried to satisfactory foundation, except possibly at the northern end of the spillway. The tremendous energy of the high velocity water jet, below the spillway, will erode any except the hardest rock, and will undermine the spillway foundation if same is not carried to solid rock. It will be necessary either to extend the foundation to solid rock or to extend a heavy concrete apron far enough downstream to safeguard the stability of the structure. It is difficult to determine accurately the additional rock excavation and the additional concrete that will be required for adequate structure foundations until the foundation is uncovered. The available rock data would indicate that considerable additional cost will be involved, but I have made no separate allowance for this additional cost.

For the six gate installation, as outlined above, the total rock excavation on the basis of the spillway design as shown on the contract drawings, would be 65,000 cu.

(239) yds. At the bid price of $3.25 per cu. yd., the cost of this item would be $211,250.

11) EARTH EXCAVATION FOR POWERHOUSE AND SPILLWAY.

The contract specifications call for 10,000 cu. yds. of earth excavation for the powerhouse, spillway and the portion of the tailrace extending 350 ft. downstream of the upstream face of the powerhouse. This quantity of earth excavation would seem to be seriously in error. Based on the original ground contours and typical sections of the structures, as shown on the contract drawings, the required earth excavation would be 36,700 cu. yds. for the 4 gate layout proposed by the County. For the 6 gate spillway, the total earth excavation would be 51,000 cu. yds. and at the bid price of 65c per cu. yd. would cost $33,150.

12) SPILLWAY CONCRETE.

As outlined above under the item of rock excavation, the churn drill and core drill data furnished by the County indicate that the spillway piers, cut-off walls, and possibly the spillway proper, would have to be carried to lower level than is indicated on the contract drawings, to secure adequate foundation. The drill boring data is insufficient to permit an accurate determination of the additional concrete which would be required, and I have therefore not increased the concrete quantities as called for in the specifications.

The contract specifications call for a total of 6,365 cu. yds. of concrete for the spillway, classified as follows:

50 Cu. Yds.—Class A.
4,365 Cu. Yds.—Class B.
1,950 Cu. Yds.—Class C.

While the total quantity is essentially correct, on the basis of the design as shown on the contract drawings, the classification is in error, in that the Class A concrete specified on Drawing No. P. S.-102 for "12 in. of surface" for the concrete spillway would amount to 410 cu. yds. even if limited only to the downstream wearing surface of the 4 gates.

(240.) For the 6 gate installation, and considering the same design for the two additional gateways as is shown on the contract drawings for the adjacent gateway, 2,865 cu. yds. of additional concrete would be required. At the mean bid price of $13.58 per cu. yd. the additional cost would be $38,907. The total of 9,230 cu. yds. of spillway concrete would cost $125,343.

The specifications call for 60,000 lbs. of reinforcing steel for the four gate layout. For the six gate installation, 100,000 lbs. would be required, and at the bid price of 45¢ per pound would cost $4,500.

13). POWERHOUSE BULKHEAD AND SUBSTRUCTURE.

As outlined above, in the discussion of the spillway concrete, the available churn and core drill data is insufficient to determine the adequacy of the foundation and the additional concrete that would be required to extend the bulkhead to suitable foundation.

14) POWERHOUSE SUPERSTRUCTURE.

The powerhouse superstructure is covered by Contract #4, on which a low bid of $29,000 has been submitted. This does not include lighting system.

15) HYDRAULIC EQUIPMENT.

The Hydraulic Turbines and Governor systems are covered by Contract #1. There will be, in addition, the cost of the services of the erection superintendent furnished by the turbine manufacturer at $25 per day. The services of this superintendent will be required for a period of at least 4 months and will cost $3,000. I have also included an allowance of 1% to cover miscellaneous costs not covered above, such as cost of acceptance tests, crane service, etc. The total cost of the hydraulic equipment, completely installed, would therefore be $181,000.

16) ELECTRICAL EQUIPMENT.

The water wheel generators, switch gear, and the apparatus, wiring and steel work required for the outdoor step-up station is covered under Contract #2. The cost

(241) of supervision of installation on the basis of $22 per day for services of erection superintendent, as specified in Contract #2, will be at least $2,000. I have also included 0.5% to cover other miscellaneous material and labor costs, such as cost of crane service, electric power, insurance, lubricating oil, etc. The total cost of the electrical equipment, completely installed, will be $343,900.

17) POWERHOUSE CRANE.

The powerhouse crane is covered in Contract #5 and for this the total cost is $7,100.

18) TAINTOR GATES AND HOISTS.

Four 25 ft. high x 38 ft. wide Taintor gates and hoists are called for in Contract #5, and the low bid price for this material, delivered f. o. b. Chappells, S. C., was $51,050. The bid price for erection, as covered in the general contract was $6,000. The services of the erection superintendent, at $15. per day will be at least $450. The above total cost of $57,500. for the 4 gates, does not include the cost of wiring to the hoist motors. On this same basis, the cost of equipment and erection for the 6 gate installation will be $86,250.

19) PENSTOCK GATES AND HOISTS.

In Contract #5 the low bid price was $14,300 for the material, f. o. b. Chappells, South Carolina. The low bid price for erection labor was $2,000. The services of erection superintendent at $25 per day specified by the bidder, will be at least $750. The total cost of the gate installation, not including wiring to the hoist motors, would be $17,050.

20) TRASH RACKS.

The low bid price on the trash rack material was $2,900, while the low bid price on erecting same was $1,500, giving a total cost for the trash racks of $4,400.

21) WALKWAY ON TOP OF SPILLWAY.

For the 6 gate installation, the cost will be $3,600.

(242) 22) WATER SUPPLY SYSTEM.

The low bid price for the water supply system external to the powerhouse was $4,000. This does not include the cost of wiring connection to the pumps.

23) STATION ELECTRIC SERVICE.

The general contract does not include the wiring for miscellaneous station service equipment, nor the powerhouse lighting system. The cost of these items will be not less than $2,400.

The County would have to build, at its expense, a construction substation to supply power to the several contractors. The cost of erection, operation, maintenance and dismantling of this substation, and of temporary lines to powerhouse and pump house would be not less than $400.

24) MISCELLANEOUS STRUCTURES, EQUIPMENT AND SUPPLIES.

Neither the application nor the contracts include provision for the following:

a) Operator's Cottages.

b) Machine shop, office, transportation and testing equipment.

c) Materials and supplies in stock required both for the power plant and for the transmission and distribution network.

All of this would be necessary for proper operation of the plant, transmission lines and distribution lines. I have included a minimum allowance of $24,000 for these items.

25) OVERHEADS.

a) Engineering.

Under the terms of the contract, dated July 21, 1934,

(243) between Greenwood County and Mr. D. T. Duncan, the cost of engineering will be not less than "six per cent (6%) of the total cost of the project, exclusive of legal, administrative, and engineering fees". This will amount to at least $211,537.

b) Legal and Administrative.

The application allowance of $55,000, for legal and administrative expense during construction will, in my opinion cover the cost, and I have accepted this figure.

c) Interest During Construction.

I have computed the interest during construction on the basis of an interest rate of 4% for 1/2 the construction period of 12 months, specified in the general contract, plus a 3 months' preliminary operation period. This was charged on the total cost of the construction, which I have determined, less grant, and amounts to $93,304.

26) CONTINGENCIES AND HAZARDS.

The general contract states that "the County accepts responsibility of flood waters overtopping the dam after it reaches an elevation of 420, provided: the Contractor has so arranged his schedule of operations to conform to all the above requirements and provides for the adequate protection of the earth fills." Other elements of additional cost which I have not included in the cost of the development because of lack of definite information on which I could base an accurate determination, include the following:

Additional rock excavation for spillway and power house, to suitable foundations.

Additional concrete for spillway and power house to suitable foundations.

Cut-off between earth fill and rock surfaces at bottom of core trench and at east bank.

Extraordinary maintenance of earth dam during a number of years after dam is completed.

(244) Revisions of county roads and bridges..

Revisions of Saluda River Bridge on S. C. Highway #10.

Extras: The general contract makes provision for such extra materials and such extra labor "as the engineer may authorize in writing".

Raising of Cothran Highway Bridge.

Drilling and grouting rock foundation. The general contract states that this work, if required, will be paid for as "extra work".

Omissions and unforeseen items.

Considering the hazardous nature of this type of construction work and the meagerness of essential foundation data a 10% contingency allowance would not be out of line. As a minimum, I have allowed $200,000, or about 5 % of the cost of the development, for this item.

27) TOTAL COST OF DEVELOPMENT.

There is attached herewith, Exhibit #1, which gives a summary of the cost of the development, as outlined above. The total cost of $4,085,451 is $1,318,451 in excess of the cost of $2,767,000 shown in the application submitted by Greenwood County. It is my opinion that this excess cost is the minimum necessary to secure reasonable safety of the structures and protection to property both upstream and downstream of this project.

F. H. C.

EXHIBIT #2.

BUZZARDS ROOST PROJECT

ANNUAL COSTS.

(Based on Grant of $682,000.)

1) Administration.

General Manager	$ 4,000
1 Bookkeeper	1,800
1 Assistant	1,200

(245) Legal	1,000	$ 8,000

2) Operation and Maintenance Labor.

1 Power Plant Superintendent	$ 2,000	
7 Operators	7,000	
1 Laborer	600	
Reservoir Mosquito Control	4,500	
1 Line Foreman	2,000	
3 Linemen	3,600	
Substation Operators (part time)	1,800	
Meter Reader and Repair Men (2 men)	3,000	$ 24,500

3) Operating Supplies, Maintenance Materials and Major Repairs.

Dam and Powerhouse	$ 5,000	
Reservoir Mosquito Control	3,000	
Transmission and distribution lines	4,500	
Substations	1,500	
Transportation Equipment	1,000	
Major repairs and Contingencies	3,000	$ 18,000

4) Office and Warehouse Expenses.

Office Rent, Warehouse & Storage yard rent, Telephone, Stationery, Postage, etc.	$ 1,500	$ 1,500

5) Insurance.

Employees Liability	$ 1,500	
Fire	300	
Public Liability	100	$ 1,900

6) Taxes.

Property outside of Greenwood County.

Reservoir lands—8,000 acres at 20¢	$ 1,600	
Structures, 42% x $1,502,618 x 47 mills	29,662	$ 31,262

7) Depreciation and Betterment Reserve $ 60,000

(246) 8) Interest and Capital Retirement.

5.78% of total cost less grant ($3,403,451 x 0.0578)	$ 196,719
TOTAL ANNUAL COST	$ 341,881

B.—ANNUAL COSTS.

1) OPERATION AND MAINTENANCE.

To properly operate and maintain the proposed Buzzards Roost Project together with the substations, transmission lines and distribution lines, so as to render reasonably dependable service will require an annual expenditure of at least $53,900, as follows: (For detailed set-up, see Exhibit #2.)

Administration	$ 8,000
Operation and Maintenance Labor	$24,500
Operating Supplies, Maintenance Materials and Major Repairs	$18,000
Office and Warehouse expenses	$1,500
Insurance	$1,900
TOTAL	$53,900

The above costs represent, in my opinion, the minimum annual expenditures for proper operation and maintenance.

2) TAXES.

The entire powerhouse, spillway, approach and tailrace channels, and a portion of the reservoir and transmission lines would be located outside the limits of Greenwood County. The property taxes on this portion of the property at the tax rates prevailing in Newberry and Laurens Counties, applied to 42% of the cost which I have determined for these properties, will be $31,262 per year. (See Exhibit #2.) It is my understanding that this project would not be subject to the following state and federal taxes and I have made no allowance for same:

(247) South Carolina K. W. H. Generation Tax.
South Carolina Gross Receipts—License Tax.
South Carolina Property—License—Tax.
South Carolina Railroad Commission Tax.
South Carolina State Income Tax.
Federal Income Tax.
Federal Capital Stock Tax.
Federal 3% Tax on Retail Sales.

3) DEPRECIATION AND BETTERMENT RESERVE.

To take care of the loss in value of the power plant and transmission and distribution system due to wear and tear, obsolescence or to other causes, and to permit replacement and improvement of plant and equipment, an annual sum should be set aside and a reserve created. The annual charge for these purposes, specified in a resolution of the Finance Board of Greenwood County, on the basis of their considerably lower estimate of cost of development, is $60,000. While a higher cost of development would require additional allowance for this reserve, I have not increased this amount.

4) INTEREST AND CAPITAL RETIREMENT.

Considering a maximum grant by the P. W. A. of $682,000 the net cost of the project to Greenwood County would be not less than $3,403,451. Considering that 4% bonds would be issued for this entire amount and that these will be retired in thirty years, the average annual cost, at the rate of 5.78% would be $196,719.

Should the grant be increased to $885,000 so as to equal 30% of the increased cost of the development (materials and labor), the annual charge for interest and capital retirement would be reduced by $11,745 per year.

5) TOTAL ANNUAL COST.

On the above bases the total annual cost including operation and maintenance, taxes, depreciation and betterment reserve, and capital charges would be $341,881, on the basis of the $682,000 grant.

(248) C.—POWER OUTPUT AND ANNUAL INCOME.

1) BASIS OF POWER OUTPUT STUDIES.

The Buzzards Roost Project as outlined in the application to the Federal Power Commission, will have no steam auxiliary and no interconnection with any other source of power. The available primary or firm power will therefore depend on the proper utilization of the reservoir storage. As explained below, there is a very limited market for secondary power in the Buzzards Roost territory and that at very low rates. It is therefore to the advantage of the project to develop the maximum practical amount of primary power, and my study of power output has been made on this basis.

2) PRIMARY POWER.

A detailed study, on a weekly basis, shows that the maximum amount of primary power that could be delivered on the basis of a 20 ft. drawdown is 28 million K. W. H. per year. It is important to note that in the absence of actual streamflow data during the dry year 1925, this study of primary power was based on the streamflow as estimated for this period by the U. S. Army Engineers, on the basis of the U. S. Weather Bureau daily gage height readings, and a rating curve established several years later by the U. S. G. S. It is also important to consider that while the year 1925 is the driest on record to date, there is no assurance that more severe droughts will not occur in the future. In my opinion a reasonable estimate of primary power would not exceed 25 million K. W. H. per year.

3) ANNUAL INCOME FROM PRIMARY POWER.

The application lists, as under contract for primary power, four cities, two oil mills, one glass plant and rural electrification. The "estimated yearly consumption" for these customers is given at 15,200,000 K. W. H. and the total income at $129,300. This would give an average rate for primary power of 8.5 mills per K. W. H.

Should the county sell the remaining available primary power to large industrial consumers, the aver-

(249) age rate per K. W. H. of estimated annual consumption would be about 7.5 mills. Should a portion of this power be sold to smaller cities, the average rate per K. W. H. to these customers would be about 8.5 mills per K. W. H. Even if it is considered that all the available remaining primary power will be sold at the average rate of 8.5 mills per K. W. H. the average annual income would be as follows:

Reasonable estimate of available primary power—25,000,000 K. W. H. @ 8.5 mills	$212,500
Maximum estimate of available primary power—28,000,000 K. W. H. @ 8.5 mills	$238,000

The above is based on the assumption that the county will be able to sell, during each and every year, 100% of all of its available primary power. This is impossible in a practical enterprise. The amount of power which will be taken by the industrial consumers will vary from year to year with the economic conditions. This is also true, though to a lesser extent, with the power demand of the cities whose prosperity depends on their industries. The average power that will be delivered during a period of years will be less than during the peak year of that period, while the power delivery during the peak must be less than the maximum capacity of the plant, otherwise no margin of safety would be available. Over a period of years, the average annual income from the sale of primary power will be less than the theoretical income computed on the basis of assumed sale of 100% of available primary power, during each and every year. In my opinion, the $212,500, as shown in the above table, is the maximum annual income that can reasonably be expected from the sale of primary power.

4) SECONDARY AND DUMP POWER.

Operating the 3 generating units at their full capacity of 15,000 K. W. during 80 hours per week will give a maximum weekly production of 1,200,000 K. W. H. of which 92% or 1,104,000 K. W. H. would be available for delivery. Deducting the primary power would give 559,000 K. W. H. as the maximum weekly secondary and dump power available for delivery, whenever there is

(250) sufficient streamflow to produce this power. A detailed study, on a weekly basis, for the 30 year period ending with 1933 shows that secondary and dump power would have been available as follows:

	Ten Year Period Ending With 1933	Thirty year Period Ending With 1933
Average Annual K. W. H. Secondary and dump power available for delivery	11,500,000	14,000,000
Average number of weeks per year that secondary and dump power would have been available—		
255,000 K. W. H. per week	27	34.7
559,000 K. W. H. per week	12.8	14.7

The above average annual K. W. H. of secondary and dump power would have been available for delivery only on the assumption that:

a) Whenever sufficient water was available all the three generating units would be in full operating condition. If any unit were off the line for repair or maintenance the amount of secondary and dump power would be reduced.

b) The periods of abundant streamflow would coincide, at all times, with the periods of maximum activity of the industries contracting for this secondary and dump power. At periods of less than maximum industrial activity, a portion of the secondary and dump power would be wasted over the spillway.

c) All of the secondary and dump power is of such a nature as to be commercially usable.

That this is not the case, can best be emphasized by the following schedule of secondary and dump power delivery which would have been necessary during 1933,

(251) the year which most nearly approaches the average for the above 30 year period:—

No. of Week beginning With January 1st	Schedule of delivery for secondary and dump power (100%=559,000 KWH per wk.)	% of Total Secondary and Dump on Line
10	Deliver— 100%	100%
1	Cut off— 20%	80%
1	Restore— 20%	100%
1	Cut off— 25%	75%
1	Cut off— 10% more	65%
1	Restore— 2%	67%
1	Restore— 33%	100%
1	Cut off— 35%	65%
1	Cut off— 9%	56%
1	Restore— 44%	100%
4	Cut off— 54%	46%
2	Cut off— 100%	0%
5	Restore— 46%	46%
5	Cut off— 100%	0%
1	Restore— 100%	100%
1	Cut off— 1%	99%
2	Cut off— 53% more	46%
13	Cut off— 100%	0%

This extreme lack of continuity would make a portion of this power commercially valueless. In my opinion, a reasonable estimate of the available secondary and dump power would not exceed 10 million K. W. H. per year.

5) ANNUAL INCOME FROM SECONDARY POWER

Secondary power, in the Buzzards Roost territory, can be sold only to cotton mills which have their own steam plants. A few of these steam plants are still of the old and inefficient type, which are being gradually eliminated or replaced with modern power plants. Most of the prospective secondary load listed in the application is now being furnished with power from steam plants of the modern type. The few mills depending on old and inefficient steam plants may be willing to pay the

(252) 5 mills per K.W.H. rate for secondary power which, the application claims, is the rate of the contract with the Grendel Cotton Mill. To be able to take this secondary power it will be necessary for these mills to maintain their old steam plants in shape to pick up the load whenever the secondary power is cut off. It is not reasonable to expect that these old steam plants will be kept in operation during the life of the Buzzards Roost Project.

The more modern cotton mill steam plant can produce power with a coal consumption of about 1.5 lbs. of coal per K.W.H. at a fuel cost of about 3.5 mills per K.W.H. It would not be in the interest of the mill with a modern steam plant to buy secondary and dump power unless it can save money doing so.

The application lists one contract for secondary power with the Grendel Mills at the rate of 5 mills per K.W.H., with an estimated annual consumption of 3,000,000 K.W.H. per year. The remaining secondary and dump power available is, as outlined above,

7,000,000 K.W.H. per year, considering a reasonable estimate of total secondary and dump power of 10,000,000 K.W.H. per year, and

11,000,000 KWH. per year, considering the maximum estimate of 14,000,000 K.W.H. per year.

It is my opinion that over a long period of years there will be no market for this secondary and dump power at the 5 mill rate, and that a reasonable estimate of the possible average annual income from the sale of the remaining secondary and dump power will not exceed the equivalent of 7,000,000 K.W.H. at 3.5 mills. On this basis, the income from the sale of secondary power would be:

3,000,000 K.W.H.	@ 5 mills	$15,000
7,000,000 K.W.H.	@ 3.5 "	24,500
	TOTAL	$39,500

(253) 6) TOTAL ANNUAL INCOME

The total annual income from the sale of both primary, secondary and dump power, as outlined above, will be as follows:

Primary Power	$212,500
Secondary & Dump Power	39,500
TOTAL	$252,000

This is the maximum average annual income that could reasonably be expected from this project over a

W. D. FAUCETTE, a witness for the plaintiffs, being first duly sworn, testified as follows:

I am chief engineer of the Seaboard Air Line Railroad and have been since January 1, 1913. I have practiced the profession of an engineer substantially since I left college which was 34 years ago, and my work during that period has been largely devoted to railroad engineering.

I am familiar with the track of the Seaboard where it crosses the Saluda River and Cane Creek above the proposed Buzzard Roost development. This line is our main line to Atlanta and Birmingham districts. The line through Greenwood is the main line of that part. These crossings are about nine miles from the proposed dam site. At the Saluda River crossing we have four concrete or masonry piers sustaining steel spans which are two hundred feet in length. On each side of these piers there are trestles. The trestle structure and bridge itself is approximately 1,000 feet of opening. On each side of the trestle structure there is an earth fill. At Crane Creek we have a wooden trestle a little in excess period of years.

of 200 feet in length and an earth fill.

I have made an investigation to determine in what manner the structures composing both the Saluda River and Cane Creek crossing would be affected by the construction of the Buzzard Roost project. The water will flow back on all the right-of-way and tracks in that val-

(254) ley and cover over the tracks at the Cane Creek location, and, we believe, it will rise above the rail for a distance along the tracks in excess of 3,000 feet. At the low spot of this crossing it will be something like 14 feet above the cross ties. At the Saluda River bridge, we believe, the high water breaking point would be over the present top of the rail.

As a basis for our study we have used an elevation of 440 at the dam site. We have made what we consider proper allowance for back water and also proper allowance for the flow and floods reaching a point of 445-½. If the water goes any higher back at the dam, of course, we would like to go back to that question. I think Mr. Duncan gave me the information in regard to elevations, and I sent Dr. W. C. Riddick for information and from that we got the data.

We have made a study as to what changes would be necessary in our road in order to make it safe for operation if this project should be built, and we have made an estimate of the cost of those changes. We have given rather careful thought to this matter. In considering what would be the proper and safe and adequate solution to protect the railroad track and its operations and the maintenance of it at these crossings, we did it entirely in an attitude that was neutral with respect to this power project. I might say that we have no opposition to the project as such. Our interest, solely, is one of protection to the railroad, the integrity of its property and the maintenance thereof. In seeking this solution we concluded that the safe, proper and sensible thing to do was to build a parallel line off the center line of the existing route across the valley, and to that end we ran the preliminary line across that valley to both sides of that crossing. Then we made an estimate of what we thought was the proper thing to do. That estimate included the treatment of Cane Creek valley, across the Saluda River, and the route from one end to the other. We made an estimate of that study and I would like to read it into the record. I might say that the total preliminary estimate, excluding interests and equipment charges, to cover the proposed Saluda River Valley crossing, which also includes Cane Creek, is $345,334.00. I would like to add just here, as a matter of information, that to the above must be added as a cost to the railway

(255) the additional maintenance required on that line over a period of years over normal maintenance. We have figured the embankment slopes as conservatively as we thought proper to figure them. We used the rate of 2-½ to 1. If further facts shows that a flatter slope is required, we feel that the same must be added. We realize that 3 to 1 is considered about the proper and normal thing to do but in order to be as conservative and as reasonable as we could, in the consideration of this study, we adopted in this study 2-½ to 1. The width of bridge openings we have taken at approximately 1,000 feet. If further studies require larger openings, such additions must be added to the preliminary figures. The adoption of 1,000 feet of opening is less than the sum total of the openings across the valley now by some two hundred feet. After reflection and consideration, I believe, that we could do that in the interest of conservatism and at the same time reasonably protect our traffic and railroad.

We could not safely operate our railroad if this water was impounded without incurring this expense. It is our opinion that the proper and prudent treatment of this situation makes it necessary to replace these wooden trestles with steel trestles. If wooden trestles were not replaced with steel, maintenance would be affected in that the trestles would be under water. We do not attempt, where we can avoid it, to perpetuate wood under water when you have a continuous high elevation of water. It is our conclusion that the proper engineering treatment of that situation is to put steel under the track over the water. The fills would be properly riprapped to protect them from erosion and to hold the bank in its slope integrity. The slopes of the fills would 2½ to 1. I have here a copy of the preliminary estimate which I have prepared. (The plaintiffs introduced in evidence as their Exhibit No. 25 preliminary estimate referred to by Mr. Faucette, a copy of which is hereto attached.)

(The plaintiffs introduced in evidence as their Exhibits Nos. 26 to 34 inclusive, a series of letters between Mr. Faucette and Mr. Duncan, copies of which letters are hereto attached.)

We had not made any survey when we submitted

(256) the estimates contained in my letter of November 17th to Mr. Duncan. That was simply a preliminary office estimate, simply answering a letter with the best information we had at the moment, without the best or local consideration of the matter. We subsequently maturely and thoroughly considered it which brought up the subsequent information we submitted. I have no knowledge or recollection of any contact between the district government engineer and my office in regard to the estimates referred to by Mr. Duncan in his letter, of February 12, to me. The figures given by Mr. Duncan are identical with the figures of the estimate appearing on page 147 of the Congressional report upon the Santee-Cooper Basin. I think it fair to say that the $265,000.00 referred to in their estimate on page 147 of Document No. 96, 73d Congress, in order to carry out the percentages, would be increased if you added the percentages which government engineers saw fit to add. They add several percentages—overhead 5%, contingencies 8%, engineering and supervision 7%, interest during construction 3%—which if added to this $265,000.00 would carry it in excess of $325,000.00. In the light of our study we arrived at the figure $345,334.00, without interest or without equipment charges, for the proper treatment of our situation.

My letter of January 22 to Mr. Duncan was written after we had reached the conclusion that the proper, safe, and correct way to solve the problem was to build a parallel line and based on the then studies we had it appeared to us that it would be in excess of $325,000.00. This would include the Cane Creek treatment plus the Saluda River treatment. In response to Mr. Duncan's request, in my letter of February 5, I gave him such additional details as I had at that time. We have been making estimates along since the first of the year, and we ran a preliminary line, I think, in March parallel with the present crossing, to see what we could do. That gave us the basis for our more recent figures which we compiled in the last two weeks.

We do not consider that, from the standpoint of operation and maintenance of the project and the responsibility of the service which we render, it is a practical matter to leave that railroad on the present line. We think the proper thing to do is to build in parallel a line

(257) not under traffic and then put the traffic on it. We have never considered even in an academic sense the possibility of treating the old line in its present location. After this matter was brought up by Mr. Duncan, and after more careful and mature consideration of the matter, we reached the definite opinion that the way to handle it, and the proper way to handle it, was to handle it along the lines we have suggested. We believe, however, that to build in parallel would cost probably about the same as endeavornig to treat the situation on the old line, if we consented to have it treated. We feel that the practical solution is to be build a parallel line. For the last month, I would say, we have averaged about 13 trains over this track in the 24 hour period. I think it fair to our property, however, to state that we are operating now at the very lowest density of traffic. If the density of traffic would get in any way normal, we expect that number to go up to possibly 20 or more trains in the 24 hour period. In talking of it at this time, we are talking about a very low point of traffic movement.

The map of the project area filed by the County with its application to the Federal Power Commission at the Seaboard crossing over Cane Creek reads as follows: "Proposed relocation of the railroads" and shows the proposed relocation by a dotted cross line from some point north of Cane Creek to some point south of Cane Creek.

CROSS EXAMINATION.

In November 1933 in response to Mr. Duncan's request for an estimate I wrote him the letter which is offered in evidence of November 17, 1933, I believe, and gave him an estimate for raising the crossing over the Saluda River proper 6.63 ft. of $60,100. Gave him an estimate for raising the track and fill 11.36 ft. of $81,700.

Subsequent to November 17, 1933, we engaged Dr. W. C. Riddick to make a report and we discussed the question of the scope and nature of the investigation. Mr. Duncan, as I recall, wrote me or came to my office and in the conversation or in Mr. Duncan's subsequent letters he referred to the fact that it appeared to him that he might have omitted the treatment of the Cane

(258) Creek crossing. Of course, I discussed that with my staff in the office at considerable length. We discussed in detail the effect of such a preliminary discussion and reached the immediate conclusion that we would have to go into this thing more maturely and more thoroughly. Colonel Johnson who I believe represented the Duke Power people, came to see me sometime after January 1, 1935. When Mr. Duncan said that he had omitted the question of the Cane Creek crossing from the problem, and in the reflection of the fact that we had this railroad and were responsible for it, and the thing began to unfold itself to me, that it was proper, in my duty, to go into the matter more thoroughly, I did do so and made the more detailed estimate which I gave Mr. Duncan. Realizing that we had a problem there, which if you were going to flood the entire valley, we could not treat lightly, and on our own initiative and acting under the responsibility with which we are charged, we undertook to make the investigation for our protection. I was not directed by any superior to get up these estimates. The estimates have not been approved by the Receivers of the Seaboard.

The names of the representatives of the Seaboard who are here today for this hearing are Mr. E. A. Frink, Engineer of Bridges; Judge W. P. Green of Abbeville, S. C., is our counsel; Mr. H. S. Thomas, Engineer of Construction; Mr. W. D. Simpson, Acct. Chief Engineer of Maintenance; and I think Mr. M. H. Gold, who is Superintendent of Operations, is here, and my secretary is here, just with me and Mr. H. Leard is here, just as an assistant to me—just to help me with my material and assist me. I believe the agent here in Greenville, Mr. Elliott, is in town.

It was determined by our Legal Department that I would be the witness. The Duke Power Company is not reimbursing us for what we paid Mr. Riddick for his examination. Not one cent, nor do we ask them or anyone to pay Dr. Riddick. They are not paying one cent of the expenses of this group of gentlemen of the Seaboard here.

The Seaboard has an interchange with the P. & N. at Pinoca and at Greenwood. The head of our Traffic Department is Chas. R. Capps, Chief Traffic Officer for the Federal Receivers.

W. D. FAUCETTE.

(259) Now as to my general knowledge of the condition of our railroad and our freight, would say, knowing Mr. Capps capability, that his estimates were approximately correct. As to my own knowledge, I have no knowledge.

The present grade on our fill now is between 1-¼ to 1 and 1-½ to 1. That is less expensive than 2-½ to 1 as there is less volume. We work to a standard of 1-½ to 1 on all fills without water. For normal material on normal slope conditions 1-½ to 1 is normal with dry material, but in water and sand conditions we take a flatter slope. In our estimate of $345,000.00 we have eliminated all wooden trestles.

I think the present bridge over the Saluda River was built some five or six years ago. We replaced the steel spans without removing the traffic, but it should be stated that you are on some substantial elevation which is an entirely different problem from every point of view. Replacements may be made without removing traffic but such work does interrupt traffic continually. It is a question of whether we can give the service required under our speed. As a competitor we have the strongest conditions to face and we must use every means to facilitate traffic. The structure which is contemplated in our estimate of $345,334.00 would not be a great deal better than the present structure.

I do not know what valuation is placed on this bridge by the Interstate Commerce Commission. (By agreement it was stipulated that the plaintiffs objected to all testimony in reference to valuation by the Interstate Commerce Commission.) I have no reason to doubt the accuracy of the paper which you hand me as a valuation by the Interstate Commerce Commission. It reads as follows: "Total reproduction cost, as shown in basic engineering report, of bridge over Saluda River on valuation date, June 30, 1918, with prices as of 1910-1914. Cost of reproduction, new, substructure—stone piers, $12,988.00; superstructure—steel, $12,534.00; timber trestle approaches, $13,378.00; engineering and general expenditures, $4,303.00. Less depreciation, $28,933.00." It shows a grand total, new, as of June 30, 1918, of $44,759.00. I would like to say in commenting that this is of 1918 which is 17 years ago. The conditions as of that date are not represented by this statement. As a matter of fact, I have protested the record of 1918 formally with

(260) the government. We do not accept as a fair measure of value the government's valuation and this is not a fair valuation as of this time. We do not recognize the depreciation in any event.

It would be more expensive to raise the bridge to a high water mark of 455 than to a mark of 440. It wouldn't be substantially more but it would be some more.

RE-DIRECT EXAMINATION.

I see no relation between the valuation of the Interstate Commerce Commission and the making of this change.

M. R. KIMBRELL, a witness for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I have been employed by the Duke Power Company, or its predecessors, since 1909. Since 1913, I have been engaged in the design and in the preparation of all estimates on transmission lines and substations. I have made a study of the effect of the construction of the proposed Buzzard Roost project on our transmission line crossing the Saluda River, about four miles above the proposed dam. This transmission line is constructed of steel towers with two 100 K. V. circuits of 266,800 A.C. S.R. and one ground conductor. It has as its immediate terminals Newberry and Greenwood and is one of our main lines, being a part of the double circuit 100 K. V. loop extending from Newberry to Greenwood, Belton, Greenville, and Spartanburg and back to Newberry by way of Union and Whitmire. With the water level at the top of the proposed flood gates at Elev. 440 and not considering back water, a total of 17 of the steel towers will be submerged as follows:

3 Towers 10 to 15 feet
2 Towers 20 to 25 feet
4 Towers 30 to 35 feet
7 Towers 40 to 45 feet
1 Tower 46 feet.

(261) Any rise in water level due to flood conditions will, of course, increase the submergence in proportion. In my study of the solution of the problem presented by the submergence of this line by the proposed Buzzard Roost project, I have followed the standard practice of the company in connection with its own reservoir crossings and in connection with crossings of reservoirs of other companies; that policy being that to insure safe operation and proper maintenance of the transmission line and to insure uninterrupted service to its customers, it is necessary that towers be located so as to be normally accessible for inspection, maintenance and repair. I find that the most economical method of taking care of the situation presented by the proposed Buzzard Roost project is to relocate 3.1 miles of the present line, so as to permit crossing of reservoir at a narrow point about 3,000 feet above its present location. The length of the reservoir crossing will be approximately 6,300 feet, and will be made up of four spans of approximately 1,000, 2,700, 1,000, and 1,600 feet respectively. A total length of 2.2 miles of standard tower line construction would connect the reservoir crossing section with the existing transmission line. In making the estimate for the reservoir crossing section, I have assumed the same loading conditions as for the existing line and have determined the size of conductors and heights of towers so as to give the most economical overall cost of construction. Estimated cost for the necessary relocation of this line is as follows:

(a) Cost of high strength conductors (266,800 C. M. A. C. S. R. 10,000 # tension—special)	$4,100.
Cost of stringing conductors	1,500.
(b) Cost of insulators and fittings in place	3,700.
(c) Cost of tower footings in place: for 2 towers (85 yds. at $20.00 each)	3,400.
for 3 towers (50 yds. at $20.00 each)	3,000.

(262) (d) Cost of towers erected:

2 towers at 75,000#	150,000#		
3 towers at 35,000#	105,000#		
	255,000#	at 9.5¢	24,200.

(e) Erecting 2.2 miles of line	$3,100.	
Taking down 3.1 miles of line & returning to stock	4,300.	
Additional for 2 angle towers in place	500.	
Less credit for .9 mile of material	($7,900.) 3,700.	
	$4,200.	4,200.
Total		$44,100.

In addition to the above there will be all expenses for the necessary rights-of-way and clearing. In other words, the basis of the foregoing estimate is that I have charged the County with the complete cost of the 6,300 feet reservoir crossing section, this being a special type of construction; I have charged the County with the cost of taking down the 3.1 miles of existing line which will have to be taken down and with the cost of erecting the 2.2 miles standard tower line construction which will have to be erected at the new location and have credited the County with the material in the .9 mile of the present line which can be salvaged and restored to stock.

The Duke Power System has no towers in water anywhere. The Duke Power Company, when it rebuilt the Catawba dam, in order to prevent having any towers in water went to a similar expense as that which I have used in making my estimate of the cost of the relocating or changing the tower line which would be flooded out by the Buzzard Roost project. We have crossings over the reservoirs in other places that we constructed that way because that was the shortest and most economical. If water is put around steel towers in one of these reservoirs, the steel will rust much quicker than if it was in dirt. These steel towers at present are constructed of comparatively light steel. In the event of floods, if a

(263) tree or log hit one of the corner legs it would buckle and the tower would come down.

The plaintiffs introduced in evidence as their Exhibit No. 35 copy of Release No. 989 issued by the Federal Emergency Administrator of Public Works, dated September 27, 1934, which copy was furnished plaintiffs by the defendant, Harold L. Ickes, etc. in response to notice of plaintiffs to produce same, a copy of which said Release, marked plaintiffs' exhibit #35, is hereto attached.

Plaintiffs introduced in evidence as their Exhibit No. 36 copy of Circular No. 1 issued by the Federal Emergency Administrator of Public Works, dated July 31, 1933, entitled "The purposes, policies, functioning and organization of the Emergency Administration—the Rules prescribed by the President", which copy was furnished by defendant Ickes, and a copy of which said Circular, marked plaintiffs' exhibit #36, is hereto attached.

Plaintiffs introduced in evidence as their Exhibit No. 37 notice to the defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, service of which was accepted by Henry T. Hunt, attorney for defendant Ickes, on June 6, 1935, in which defendant Ickes was notified to produce at the hearing "a copy of the comprehensive program of public works, as required by Section 202 of the National Industrial Recovery Act, to be prepared by the Secretary, if any such comprehensive program has been prepared". In response to said notice the defendant Ickes produced the papers which were introduced in evidence, marked plaintiffs' exhibit #38, copies of which papers, two in number, are hereto attached.

Plaintiffs introduced in evidence statement of the bonded indebtedness of Greenwood County showing said bonded indebtedness to be $1,686,500.00.

Plaintiffs introduced in evidence a statement of the value of the property in Greenwood County as assessed for taxation showing that the total assessed value of all taxable property in Greenwood County for the year 1934 was $9,093,603.00.

(264) Plaintiffs introduced in evidence as their Exhibit No. 41 copies of the power contracts which the defendant Greenwood County has made for the sale of power which would be produced by the Buzzard Roost project, said copies having been furnished plaintiffs by the defendants and being copies of all the contracts which the County has entered into for the sale of any power which would be produced by said project. A copy of which said contracts, marked plaintiffs' exhibit #41, are hereto attached.

STATEMENT OF EVIDENCE.

PART II

EVIDENCE FOR THE DEFENDANTS

J. W. BARNWELL, a witness for the defendants, being first duly sworn, testified as follows:

Direct Examination.

I am bridge engineer for the South Carolina Highway Department. After my graduation from Clemson College in 1913, and Massachusetts Institute of Technology in 1915, I worked with Dupont and after some army service went to the Highway Department of South Carolina in 1917.

I am familiar with the Cothran Memorial Bridge on Highway No. 7 over the Saluda River, having supervised its design and construction. The Highway Department has not checked any of the backwater curves or any of the engineering data to determine the effect of the Buzzard Roost project upon this bridge. We are relying on Mr. Duncan's figures as checked by the Army Engineers and the other Federal authorities.

Mr. W. S. O'B. Robinson: The plaintiffs move to strike out "as checked by the Army Engineers and the other Federal authorities." Taken subject to objection.

Using his figures it is our understanding that the water will be 3 ft. under our lowest steel. If a flood higher than the 1908 flood came it would come up to our

(265) bridge and probably over it and damage it if there were no Buzzard Roost development. We feel that with the dam there we will not have any more damage than if it wasn't there. We are making no objection to the construction of the Buzzard Roost project as planned by Mr. Duncan and the other engineers. We are doing this: We are depending on the Government authorities. We don't think it is our business. We cannot go into all the figures for the dam.

Q. Mr. Barnwell, state whether or not you have had any experience with the railroads, their underpasses, or otherwise, as to raising the railroads? A. Yes, sir, we have some plans here. We raised the Southern Railroad 7 ft. in a very much similar condition as you have here on the river. Now the bridge was 438 ft. long. We raised it 7 ft. at a cost of $14,000.

Mr. W. S. O'B. Robinson: We object to the testimony as to the Southern Railway bridge at some other place. Taken subject to objection.

Q. I will ask you whether or not this was satisfactory to the Southern after it was completed?

Mr. W. S. O'B. Robinson: Objection to the question, which applies to the entire answer.

Taken subject to objection.

A. The Southern Railroad made the plans, we checked them, and the Southern Railroad did the work —the Southern and the Highway Department did the work.

Q. When that Southern Railroad bridge was being raised, I will ask you whether or not traffic continued over the bridge?

Mr. W. S. O'B. Robinson: Objection.

Taken subject to objection.

A. Yes, sir, traffic continued over the bridge.

I have made an estimate for the raising of the Seaboard and C. & W. C. bridges in what I consider would be a reasonable and economical manner. My estimate on the C. & W. C. amounts to about $34,000 and on the

(266) Seaboard $33,000.00. These estimates contemplate raising the Seaboard six feet and the C. & W. C. five feet. I made no estimate for the bridge at Cane Creek. The estimate for the C. & W. C. includes replacing of the piles not now creosoted, jacking up the bridge and putting it on what we call pony bents, and replacing about half the bracing that is there now. The estimate for the Seaboard includes the same thing except it does not include any piles but it does include replacing most of the bracing. Raising the bridges as I suggest would cause the railroad to slow their trains up for the time the work was being done.

CROSS EXAMINATION.

I examined the C. & W. C. bridge last Tuesday. I imagine I spent not over a couple of hours in making that examination. Upon the basis of this examination I prepared my estimate of $34,000.00 between that time and this. I just made the estimate based on raising the bridge five feet and do not know what clearance that would give. My estimate contemplates raising the masonry piers five feet. It does not include any reinforcing below the addition. My estimate contemplates merely the substitution of treated material for the untreated material in the trestles and then the construction of what is called pony bents upon the top of the xisting trestle. That would give what you might call a two-story bent. My estimate contemplates leaving the fill at each end of the trestle just as they are.

I examined the Seaboard bridge last Tuesday and prepared my estimate between that time and now. This estimate contemplates the addition of six feet to the masonry piers. There would be no change in the piers below this addition. I do not know what clearance this raise of six feet would give. My estimate contemplates merely the placing of pony bents on top of the existing trestles. It does not include any element of cost for changes in the earth fills of the approaches to the trestle.

I, myself, have made no estimate or calculation of the water elevations under the Cothran Memorial Bridge under the various water conditions which would be created by the Buzzard Roost dam. The slopes on the fills at each end of the bridge are 1-½ on 1. The water would stand more or less constantly against these fills if the

(267) dam were built. This might necessitate flattening the surface of those fills and riprapping them. Of course, they have been there a good while.

D. T. DUNCAN, a witness for the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

My residence is Greenwood, S. C., and my education and experience is as follows: Graduate of Clemson College and Cornell University in Civil Engineering. Commenced the practice of engineering in 1920 and since that time have been engaged in construction work as an engineer with the following approximate years spent in different kinds of work: Highways—5 years; Railroads—2 years; Buildings—8 years; Hydro-electric—7 years. My railroad experience consists of double track construction on the A. C. L. Railroad. My principal hydro-electric experience consists of 4 years with the Lexington Water Power Company as assistant resident engineer in charge of construction of dam and clearing reservoir area and other connected engineering work.

Am Engineer in Charge of the Buzzard Roost Project. I commenced work on the Buzzard Roost Project about 2 years ago (August 1933) for Greenwood County. A declaration of intention was filed at this time with the Federal Power Commission. The original application was filed with PWA on November 16, 1933, requesting a loan and grant of $2,627,197.00. This estimate included transmission lines in Greenwood County only. Before the allotment was made at Washington on July 19, 1934, it was found desirable to serve consumers in other Counties and transmission lines were extended into Newberry and Laurens Counties with the understanding with the people in these Counties that their County would share in all profits in proportion to the amount of current consumed in each County.

This arrangement meeting with PWA approval, an allotment was made amounting to $2,767,000.00 as shown in the application for license to the Federal Power Commission dated Sept. 8, 1934.

The Federal Power Commission requested certain changes in the application for license together with some

(268) additional data. The data was submitted and on November 2, 1934, the Power Commission approved the plans and issued a license to Greenwood County to construct the Buzzard Roost Project.

The Duke Power Company entered a protest with PWA against the project and a hearing before the PWA Power Board of Review was held in Washington on July 2, 1934. After considerable delay PWA increased the allotment to $2,852,000. The Duke Power Company then entered protest with the Federal Power Commission, but at the last moment and after occasioning considerable delay and work on our part it was withdrawn and a suit commenced in Federal District Court which has been delaying the commencement of construction work for some time. These delays have, of course, occasioned quite an amount of extra cost and expense. My total estimate of the cost of the project, offered in evidence, amounts to $2,852,000. It includs a contingent fund of $292,429.21.

In the engineering, I have had three principal associates, namely, Mr. F. R. Sweeny, consulting engineer, Mr. G. R. Barksdale, electrical engineer, and Mr. J. G. Wardlaw, Jr., hydraulic and construction engineer. The original plans proposed the construction of an earth dam across the river with power house at the toe of the dam and intake towers and penstocks through the dam. The spillway was located on the east side of the river—largely as shown or described in House Doc. No. 96, 73rd Cong., 1st Sess., the Report of the War Department on the Santee River, N. C. and S. C. I have that report.

After approval of the project by P. W. A., drillings were commenced to gain further information concerning the rock foundations and to make a final layout of structures. These drillings were made with wash boring outfits and well drill machines. A rock ledge was located in a valley about one thousand feet below the dam which proved to be a most economical location. Before deciding upon this location a dam site about a quarter of a mile upstream was studied, but was finally abandoned on account of a slightly longer dam and several inches loss of head. Those drillings have been completed and they were composed of three types of drillings. The first was wash borings which we made over the area all around. I don't know exactly how many there were, but quite a number.

D. T. DUNCAN.

(269) The next item is acquisition of land, 12,566 acres at $17.50 per acre, $219,905.00. We have had the land under option at different times and have been held up on it some times; and we had six months' options and they expired, and we had them renewed, and so forth, but we have had about 85% of this land under option at one time or another. It would average about $15.75. In my opinion the land, the 12,566 acres, can be bought for $219,905.00, the amount of the estimate. This land is land that most of it is subject to overflow, or a large portion of it. There is very little cultivated land at this time. There is not a single house in the whole area that I know of. The actual area below our 440 line is approximately 12,000 acres. In my opinion, it will be unnecessary to buy 40% more land than is actually below the 440 line. I was employed by the Lexington Water Power Company for a number of years during the construction of that project, and they found it more economical to buy land outside of the area, and from the evidence I heard it seems to be the practice on other dams, which I do not doubt as so. Quite a number of people around Greenwood want lake front property on this lake, and they don't want that line in front of their house. The majority, in fact everyone I have talked to recently, much prefer to have us just buy up to the water's edge. We pay for the land to the water's edge, and give the property owner the right to enter on the lake at any time he wants to—fishing and hunting rights. In lieu of that we retain the right to be released from any damage that might come to his property by wave action, silting, or any damages that might accrue. Also, he gives us the right to keep clear the land around the edge as required by the State Health Department.

Mr. W. S. O'B. Robinson: Plaintiffs object to the statement as to the terms of the deeds under which the land would be acquired, or has been acquired, as that is a matter of record and the deeds themselves are the best evidence. Taken subject to objection.

In view of that preference by the present owners of that land, I have arrived at an estimate of 12,566 acres. In my opinion, that is ample acreage for our development. When we first started off to investigating the cost of the land, we found that there was a forestry pro-

(270) ject on the other side of Greenwood County that came almost up to this project. So we checked into what land was costing over in this area, and I found they were going to pay about $5.00 an acre. On the other side the land in this basin is not quite as good as the land that the Forestry Department proposed to buy, because it is subject to overflow and is hilly along the river. The land's value was probably about $5.00 an acre. That is what I would think it was worth, but to keep down friction it was decided to pay $15.00 an acre, or around that figure.

The next item is Number 3, transmission right-of-way—102 miles at $300.00, $30,600.00. In my opinion, the estimate of $30,600.00—$300.00 per mile—is a fair estimate for it.

Item Number 4 is clearing reservoir area—600 acres at $30.00, $180,000.00. The total reservoir area is approximately 13,000 acres. We propose to clear 10 feet below our drawing. The other area in the middle will be a small area—I don't recall the exact acres now, but probably 1500 or maybe 2,000 acres in this area in woods, and we are going to leave that there until the water comes up. There is a bunch of pulpwood men who want to take all the pulpwood out of there, and all the high trees we plan to trim off at a later date; top off the trees in this area and float them out. We got the Army Engineers' plans that show the area to be cleared. In other words, it shows the wooded area on these maps, and we actually measured off the area that they showed to be cleared. From that data and our own surveys we arrived at the conclusion that there was 6,000 acres to be cleared, which included the 25-foot strip above the water. I arrived at the figure of $30.00 an acre from former experience. I was in charge of the clearing at Lake Murray for some time, and they had a set price for clearing there of $17.50 an acre. They had a fixed price that they didn't change that I know of to the contractor. He was given $1.00 extra if he finished up and wound up the contract within a certain time. $18.50 an acre, yes, sir, and that was sufficient to induce all of them to finish up on time and receive their bonus. Lake Murray had more heavy oak trees. Up in this area the majority of the trees are second-growth pines. That is, this area has been abandoned on account of the increasing floods, due to the change in the river flow, coming up over these

(271) valleys occasionally that ruined the crops—little short floods. The timber in this area is easier to clear. In arriving at my $30.00 estimate, I have taken into consideration the wage scales required by our loan and grant agreement. In my opinion, the sum of $180,000.00 is ample to clear the necessary land and reservoir.

Item 5 is the general contract. Bids have been received on this contract. This contract includes all—$622,190.22—this contract includes all the work of building the dam, moving of the dirt, and in fact all of the actual work on the ground.

The sixth item is hydraulic turbines (bids received) low bidder—$168,327.50.

Number 7 is electrical generators, substation, etc. (bids received) low bidder—$324,544.00.

Number 8 is gates, racks, crane, etc. (bids received) low bidder—$74,350.00.

Item 10 is main transmission lines, 102 miles at $3,040. per mile—$310,000.00. Those transmission lines form a loop line that runs from the power plant to Newberry and goes over near Clinton, Laurens and back to Greenwood, with a line also running from the power plant across to Goldville. That transmission line can be built for the $310,000.00. The mileage of 102 miles is sufficient for the necessary transmission lines.

Item 11 is substations—$161,817.00. In my opinion, these six substations can be built for that figure.

Item 12 is re-routing Duke Power Company 100,000 volt transmission line, 2 miles—$26,185.00. That estimate was made up by Mr. Barksdale, and approved by me. In my opinion, it can be re-routed for that figure.

Item 14 is telephone connection to power house from Greenwood exchange—$2,000.00. The Greenwood Telephone Company gave us this estimate of cost. That will give us adequate telephone facilities.

Item 15 is raising the Seaboard Air Line Railroad over the Saluda River—$29,430.36. Turning to the drawing that relates to the crossing of the Seaboard over the Saluda River I arrived at my estimate of $29,430.36 by making a survey of it and estimated it by making drawings and cross section of the fills, and so forth. This estimate provides for raising that bridge 5.6 feet. That is the raise of the bridge itself—the main span—and it ramps off at each end on a 1% grade. With the raise

(272) of that Seaboard bridge of 5.6 feet, it gives the low steel on the bridge at our elevation 440 a clearance of 4.8 feet. Our normal water would come to 2 feet up on the steel at the present time. If we raised it five feet, six inches, the clearance would be 3 feet, six inches, or 3.6 feet; 3.6 is the correct clearance. We propose to jack the bridge up, raise the concrete piers, and to raise the trestle on a grade up to the steel bridge, starting with the bridge and coming down to get your 1% grade. The Seaboard's Chief Engineer in November, 1933, estimated a figure of $60,100.00 for a raise of 6.36 feet.

Item 16 is relocating the S. A. L. R. R. over Cane Creek—$45,128.30. We propose to build a new creosoted timber ballance deck trestle on a new location. This bridge over Cane Creek is lower than the main Saluda River bridge. The water comes over it—I have forgotten exactly the depth—probably 10 feet, so it was found more economical to relocate the track for a mile, regrade it, and eliminate the grade that was in it, give it a flatter grade than before, the alinement was practically the same, and we will build a new creosoted trestle to take the place of the one they had there of considerable age. Our estimate of $45,128.30 is sufficient for that purpose.

Item 17 is raising the C. & W. C. Railroad over Saluda River—$34,196.10. We propose to raise that bridge 4.8 feet. At 440 it gives a clearance of 4.57 feet. Mr. Willoughby's estimate on the C. & W. C. bridge is $21,870.00 for a 4.1 raise; for 9.1, $80,930.00. If we have to raise either one of these railroad bridges over the Saluda River any additional amount, it will cost about $3,000.00 a foot.

Item 18 is rip rap on fills at Cothran's bridge on Highway No. 7—$1600.00.

Item 19 is raising bridge on Highway No. 10 over Reedy River—$9,241.25. I would like to explain about this bridge. It is on Reedy River about a mile, I guess, from the main Saluda River, where Reedy River runs into Saluda River. When there is high water on Saluda River, it backs over this bridge on Reedy River. In other words, it is a low-water bridge that is inundated by every flood of any consequence with back water from the river. It is a very old bridge, the trestles are untreated piles, and a lot of the stringers, which can be

(273) seen from the pictures, are in bad condition. It is on the State Highway system, and if we raise it we will feel that the Highway Department will bear some of the cost. It is an old-type bridge and should be raised by them, in my opinion. I found that they are going to have to raise it higher than it is now when they rebuild it. If they raise it higher it will most probably be high enough to clear our water, which will relieve us of any cost on it. At any rate we should be reimbursed for any money we spend on a better structure than they have now.

Item 24 is engineering—$154,001.89, and was arrived at on the basis of 6% of construction and land.

Item 25 is legal and administration—$55,000.

Item 26 is interest during construction—$75,000.

Item 29 is contingencies—$292,429.21. That is to take up any over-runs in any other items that might occur in bids, any incidental expenses you cannot think of, or haven't provided for in advance.

My estimate today is that the project can be completed for $292,000.00 less than the allotment. We made little changes as we went along, and our preliminary estimate gradually works into a final estimate. The County Engineer's estimate to the Federal Power Commission on the items for which bids have been received amounted to $1,251,022.00, and the contractors' bid amounted to $1,188,411.72, a saving of $62,610.28. The first item in our estimate of annual operation and fixed charges, (Defendants' Exhibit No. 24) debt service, is merely a mathematical calculation based on the amount of the loan, $2,170,000.00, at 4%, amortized over 25 years. I didn't allow any taxes on account of the fact that it is a county-owned plant, and at any rate I don't think they would run over $5,000.00. There was some question raised that some of the school districts would be left without funds if they were not paying the school tax, so that maybe they will have to pay a little bit. At the present time I do not estimate that we will have to pay any property taxes.

I think the primary power developed will run a little over 30 million K.W.H. We have calculated it under different drawdown conditions, different periods, and different ways, and it runs from 30 to 34 millions. We have used 30 million K.W.H. primary power in this

(274) table. We only estimate 11 million K.W.H. secondary power. That is a very conservative estimate. There are different ways you can figure it, but most of them would run higher than that. In arriving at the amount of power available, we had the data supplied by the Army Engineers in the 308 Report, the Santee River Report, and other information besides that. The Army Engineers' Report shows the drainage area, rainfall, and river flow. Those are the items, with the plans and specifications of the dam, used in making up my estimate. We have additional information from the United States Geological Survey's station at Chappells. I made the first calculations as to available power. These last figures were made by Mr. Sweeny and Mr. Wardlaw. Primary power at 8.5 mills will yield an income of $255,000.00 a year. Secondary power at 5 mills will yield an income of $55,000.00. A total of $310,000.00 a year. The first year, gross revenue—$310,000.00; operating cost—$47,600.00; insurance—$3,000.00. That gives you a net revenue of $259,400.00. After paying the service on the loan, principal and interest, that gives us a surplus that first year of $122,600. At the 12th year our accumulated surplus should pay up the loan.

In one of the resolutions of the Board a depreciation fund of $60,000 is set up for depreciation and contingencies. I didn't allow for any depreciation in this table, because I found out that it is not required by the P. W. A. to have any depreciation where your project is retiring itself in the period of the loan. They allow you to use your borrowing power again. After a loan is retired you can do that, and take care of it at that time.

Mr. Haynsworth: We object to that because that should be shown by some record. Taken subject to objection.

CROSS EXAMINATION.

In my estimate of the cost of the project as given in my direct examination I have left off any item for rural electrification.

I never designed a dam completely before. I have experience in constructing railroad bridges and trestles but not in designing them. I have never constructed one across a reservoir, but have constructed them across

(275) rivers, swamps and water like that. I have never been charged with the responsibility of maintaining a railroad bridge across a reservoir over which railroad traffic was moved, and I am not familiar with the schedule of construction and maintenance that railroads have in connection with wooden trestles over waterways, but I should think they ought to be inspected at intervals. With the Buzzard Roost reservoir completed and the water raised from 25 to 30 ft. high on the railroad trestles above the dam a large portion of the longitudinal and transverse bracing with the bolt connections would be submerged and ordinarily not accessible for inspection and maintenance. There would be long periods when the reservoir drawdown would be only a few feet. It would be difficult and expensive to replace any portion of these wooden trestles and any braces under the conditions of submergence which would be brought about by the Buzzard Roost reservoir. I have made no careful engineering analysis of the design of the present piers of the railroad bridges for the purpose of determining whether it would be necessary to strengthen the piers if the bridges were raised. The higher level of the track would impose a higher stress on the piers.

In my plans of changing these railroad bridges I show a 2 to 1 slope of the fills on each side. We used a 2 to 1 slope on another highway bridge across a reservoir which has been very successful and they have never had any trouble with it. That was a highway bridge, and the traffic over a railroad bridge is very different from the traffic over a highway bridge, traffic over a railroad moving in much larger and heavier units. Heaviness of traffic has no effect on slope of fill. On the dam we use a 3 to 1 slope on the upstream side where the water will be against the dam. The maximum height of the fill on the Seaboard bridge which I would construct would be 40 feet. These railroad fills would be saturated by water on both sides while the dam would have water only on one side. My plans of the proposed change in the railroad fills show rip-rap extending one ft. above normal water level and extending only 10 ft. below normal water level. The maximum drawdown of the reservoir is 20 ft. I have not calculated the reach of the open water against the railroad fills or estimated the height of the waves. The estimate of the cost of

(276) these railroad changes included in my estimate of the total cost of the project is not a finished estimate.

In the County's plan for relocating the Seaboard Air Line Railway over Cane Creek the span above the creek would be 60 ft. in length, and under the County's proposal this span would not be a steel span but creosoted timber. You could not put in a 60 ft. wood span. It would have to be steel. The County's estimate of cost to relocate this bridge over Cane Creek does not include the cost of this steel, but the estimate is sufficient to put a 60 ft. steel span in if we wanted to because the dirt price is a little high and so is rock. I do not know what a 60 ft. steel span would cost. No 60 ft. span was intended at Cane Creek. In our estimate we did not consider steel for this span but the estimate was based on a creosoted timber bridge out and out. The County's plan contemplates relocating the Seaboard over Cane Creek for a distance of approximately a mile.

The County has not actually purchased any land for this development. I think it owns some land in there that was taken in for taxes. I don't know how much, but some,—a considerable amount. I have allowed 12,000 acres for the reservoir below 440. I do not recall the acreage allowed for the 25 ft. strip above 440, but the total acreage computed for the reservoir is 12,556 acres. We haven't been able to buy the land for the powerhouse site, and will probably have to condemn it. The only price we have been able to get the owner to name so far was $50,000, and we have a condemnation suit pending against the owner. We also have another condemnation suit pending. When water of the reservoir reaches the height of 445 I think the land covered would be about 13,200 acres. Quite a number of streams, creeks and other tributaries would enter the reservoir. Where streams enter a reservoir that causes sand to deposit at the mouth of the stream and it is customary and usual for property owners up the stream to make claims on account of the stream filling up and their bottom land becoming soggy. Frequent claims have been made on that account. At other hydro-electric plants in this same territory streams entering the reservoirs have filled up and there have been claims for property damage by property owners on such streams.

Referring to the clearing of the reservoir the County

(277) proposes to clear down to elevation 410, and then leave the trees standing temporarily. I have no item for clearing below 410 in my estimate of cost. The acreage below elevation 410 is about 4400 acres, but I would say that approximately 700 acres of this is in the river channel. It is our plan to give away or dispose of all the merchantable timber in this area below 410. We propose to leave the other trees and raise the water on them, and then later on go in and cut off the tops of these trees and flood them out, or if it should be decided to be more economical to cut these trees and tie them down with wires as we did on Lake Murray. I have not included anything in my estimate for cutting the trees and taking them out of the water after it is raised, but we hope to get most of them taken out for pulp wood and the like. In clearing the reservoir we propose to pay PWA labor rates of 40c an hour for common labor. The clearing at Lake Murray, to which I referred on my direct examination, was done with common labor at 20c or 25c per hour. I referred in my direct examination to the clearing of Lake Murray, saying in my direct examination that I arrived at my figure of $30.00 an acre for clearing the Buzzard Roost reservoir from my former experience from being in charge of the clearing at Lake Murray, and that the cost of clearing there was $18.50 an acre. I was in charge of the clearing at Lake Murray which was done by contract, which constituted about one-fourth of the clearing. I am not familiar with the cost of clearing at Lake Murray. The records of all the cost were turned into Mr. Costello, the Treasurer of the Company, and he kept the accounts. I didn't intend to leave the impression by my direct examination that the average cost for clearing at Lake Murray was $18.50 per acre. That was the direct cost of the clearing done by contract not considering overhead and other things. I think more than 50% of the clearing at Lake Murray was by contract, but I don't know.

Direct Examination.

By D. W. Robinson, Esq.:

In a steam plant the percentage of capital is small, and the percentage of the cost of operation is large. If

(278) a steam plant is idle, it is not as serious a problem as if a hydro plant is idle.

I am a member of the South Carolina Rural Electrification Authority.

We have a little better than 20% spillway capacity in excess of Lake Murray. Lake Murray is 2400 square miles, and Buzzard Roost 1100, approximately. The largest flood on the Saluda River as far as the records of the Government show was 63,000 cubic feet per second in 1908. Records have been kept since 1905. At 440 our spillway could carry more than 63,000 second-feet.

RE-CROSS EXAMINATION.

My estimate of the maximum discharge at Buzzard Roost during the August 1908 flood is not 62,000 sec. ft. The estimate of the U. S. Geological Survey is 72,000 sec. ft.

Lake Murray covers 57,000 acres but the Buzzard Roost lake will cover only approximately 12,000 acres.

G. R. BARKSDALE, a witness for the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am an electrical engineer and graduated at Clemson College in 1906. Two years ago I received my E. E. Degree at Princeton College. After finishing at Clemson, for five years, I was at the General Electric Works at Pittsfield, Mass. and served time on tests, and then was in the Engineering Department, designing small transformers. About 1912 I was transferred to the Schenectady works of the General Electric Company. About 1925 I had charge of the Electric Light and Water Works plant at Lebanon, Tenn., under a one year contract. Upon the termination of this contract, I was with the Electric Power Company for about five years as distribution engineer. My work was to have charge of the electrical engineering in all the towns except Nashville and Chattanooga, with approximately 310 towns and communities. During the depression I was dropped,

(279) along with a great many other engineers, out of the organization. Since then I have been at Greenwood, South Carolina.

The Southern Bell Telephone Company line from Greenwood to Cross Hill will be partially flooded by the Buzzard Roost reservoir. Approximately one mile of this line will have to be rerouted. The Southern Bell Telephone Company, in their letter of May 20, 1935, to Mr. Duncan, estimates that the cost of this expense will be about $6,000.00. That is the figure I used in the estimate.

Item 2—Duke 100 K. V. line. Mr. Duncan gave me a profile showing two possible routes that could be used in rerouting that portion of the Duke Power Company's 100 K. V. line that will be partially flooded by the water in the basin of the proposed Buzzard Roost Hydro Project. In order to obtain a fair estimate of the cost of rerouting this line, I turned the profile over to the Graybar Electric Company, Atlanta, Georgia, who had assured me that they could obtain the information from their connections who were reliable. The Graybar Electric Company received and forwarded to me tower drawings and profiles from Riter-Conley Company, Pittsburgh, Pa., and the American Bridge Company, Pittsburgh, Pa. From the information received from these companies the Graybar Electric Company submitted an estimate as follows:

Mr. Haynsworth: Now we object to that as being hearsay.

Taken subject to objection.

A. Route No. 1—12 towers—$26,185.21; Route No. 2—15 towers—$25,834.13.

Q. Now, Mr. Barksdale, from your knowledge and experience as an electrical engineer, in your opinion can this re-routing of this line be built on the 12-tower plan for $26,185.21? A. I do not know. I have never designed or built any 110,000 volt lines.

Q. Are these companies who have submitted these estimates reliable companies? A. I do not know, but I assume that they enjoy a very good reputation.

(280) After making a study of the transmission problem with the data available, I recommended that a 44 K. V. loop line be constructed from the Hydro-Plant to Newberry, to Laurens, to Greenwood to the Hydro Plant. I also recommended that a tie line be built from the Hydro Plant to a point near Goldville. A tie line at this point would enable the serving of large loads at any of the towns to be served on the loop with good regulation as we proposed to install induction voltage regulators at all substations. In order to maintain two-way service it would be necessary to keep the loop closed. If the loop is closed it becomes necessary to install suitable oil switches in the 44 K. V. line with automatic control by means of directional relays. Therefore, I recommended that this automatic oil switch equipment be installed. The cost of the transmission lines as described was estimated at $3,040.00, plus $300.00 per mile for right-of-way. 102 miles 44 K. V. lines at $3,040.00—$310,000.00. This does not include the right-of-way, whic his carried in another item, which would really bring the total cost of the line of about $340,600.00. In my opinion, without a doubt, this transmission line can be built for these figures. This will give a satisfactory transmission line which will be long enough.

In order to provide telephone communication from Hydro Plant to the various substations, we propose to have the Home Telephone Company provide a double circuit from the Hydro Plant to their Cross Hill exchange. The operator at the Hydro Plant will be able to dial the Greenwood Exchange. From the Greenwood Exchange we can reach any substation over the Bell Telephone Company's system or the system of the Greenwood Telephone Company. The Home Telephone Company will make the connection and guarantee good service for an initial charge of $2,000.00. Of course, all telephones installed and toll charges will carry the prevailing rates. This estimate is covered by their letter of May 18th, 1935.

The estimate upon the cost of substations was made under my direction. This estimate is $161,817.00 and those substations, in my opinion, can be built for that figure.

CROSS EXAMINATION.

(281) In laying out the substations as I have planned them I undertook to provide only for the customers listed by the County in its application to the Federal Power Commission as customers with whom contracts had been signed, except the Farmers Oil Mill which is to be served off the 2400 bus of the Newberry substation. I also made provision for the City of Clinton and the cotton mill at Ninety-Six, which customers are listed by the County n its application to the Federal Power Commission as prospective. I have made no provision for the other customers listed as prospective.

All my estimates of transformer capacity are only tentative and are subject to revision. That is one reason I have made no attempt to draw specifications and advertise for bids. It is necessary to find out who the customers are and what kind of load or demand they require in order to provide transformer capacity which will give them good service.

The County's estimate of the annual sales to the customers with whom they have contracts is 15,900.000 K. W. H. I am not prepared to say how many additional substations and what additional substation capacity would be required if 30,000,000 K. W. H. per year were sold from this plant. When they give me the customers I must insist that they put in a certain capacity to take care of them. Assuming that the County's estimate of the power that would be produced at this plant is 30,000,000 K. W. H. primary and 11,000,000 K. W. H. secondary, I do not undertake to say that I have enough substation capacity in my present layout to provide for the sale of that amount of power.

In connection with the substations I have planned, I have provided for only one spare transformer which is an extra 100 K. V. A. for the 44,000 volt substation supplying the rural district. I am not sure but I think there is a smaller one to step up the City of Ninety-Six.

I have not worked out the K. V. A. capacity of the substations which I have provided in my layout.

(282) F. R. SWEENY, a witness for the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a consulting engineer. I finished at Clemson College in 1906. After that I went with the old Southern Power Company for a short length of time and then was connected with Clemson College on the engineering faculty. In 1909-1913, I completed my work in engineering studies at the Rensselaer Polytechnic Institute at Troy, New York. After that I went into the employ of the Foundation Company in New York and Pittsburgh. In 1919 I came South and went into the engineering business. Since that time I have been in that business at Anderson, S. C.

I have been connected with the Buzzards Roost project since its beginning and have carefully followed the work through to the present time.

FUSE PLUG AND HEAD RACE CANAL:

It is my opinion that the layout as shown on the plans represents a sound and satisfactory design involving no serious hazards.

DAM:

The dam, in my judgment, is reasonably designed in general and detail. I can see no consequential defects in the provisions for drainage at toe or in rip-rap protection.

EXCAVATION AT POWER HOUSE AND SPILLWAY:

The calculations for excavation at power house and spillway were made by others connected with the project, but were followed by me and I have confidence in the results.

FOUNDATIONS:

The foundation conditions at power house and spill-

(283) way have been carefully checked by me and I am satisfied that all reasonable conditions are satisfied in our design.

SPILLWAY:

Rather exhaustive investigations have been conducted in regard to spillway capacity as well as its relation to past rainfall intensities and consequent floods. These investigations have been carefully examined by me and I concur in the conclusions as reflected in the present spillway capacity and fuse plug provisions.

POWER PRODUCTION:

The matter of power production was very thoroughly studied by me over a period of several months. After careful consideration of the conditions involved I find that we may reasonably expect the plant to develop for sale 33,000,000 K. W. H. prime and 11,000,000 K. W. H. secondary power annually.

I have heard all of the testimony of the witnesses for the Duke Power Company. None of it has shaken my opinion on any of these matters.

Q. Do you know the plan of the low bidders on the dam for building the dam if awarded the contract? A. I understood from a conversation with them that they intend to use trucks.

Mr. W. S. O'B. Robinson: We object to the statement of what he understood from a conversation. Taken subject to objection.

If they use trucks in building the dam the effect will be to practically make the entire dam a rolled dam.

CROSS EXAMINATION.

I have never designed a hydro-electric plant the size of the Buzzard Roost plant. I have never been in charge of the construction of a plant of that magnitude. I have designed one or two small hydro-electric plants, one was for the Capps Manufacturing Comapny. The plant was for only a few horsepower. It was started by others

(284) and I completed the penstock line. The dam was built when I went there and the power house was started. It was completed under my supervision. Another was a 100 horse-power plant at Walhalla for the D. A. R. School at Tamassee. I was called in because of the failure of the plant at Highlands to deliver its capacity and I made certain changes which resulted in it giving its complete capacity.

I have never operated a hydro-electric system such as this one. I tentatively aproved the original layout for this project. It was my opinion that the project as then laid out, with the assumptions made at that time, was sound from an engineering point of view. Since then the project has been changed and the dam moved across the river.

I have never designed an earth dam as large as the one for the Buzzard Roost project. I designed one or two small ones. One was for the Carey Lake above Pickens, which is just a pleasure lake. I have designed none comparable to this dam. I have never designed a fuse plug. I have never designed a railroad bridge over a reservoir. I have never out and out designed any railroad bridges. I have had something to do with the engineering of railroad bridges when with the Foundation Company. One particularly was for the Beaver River bridge on the Pennsylvania lines west just outside of Pittsburgh, and various other railroad structures, particularly in foundation features. I have never been responsible for the design of the structures. I have never been responsible for the maintenance of a railroad bridge.

I have never made an estimate of the power output of any hydro-electric project, comparable to this Buzzard Roost project, which was in fact constructed. The problems are all identical though regardless of magnitude. I have studied estimates of the power output for projects such as this.

RE-DIRECT EXAMINATION.

If the power projects above Buzzard Roost on the Saluda River are developed the primary power output at Buzzard Roost will be increased, depending, of course, on the size of the reservoir and the storage capacity.

(285) J. G. WARDLAW, a witness for the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By D. W. Robinson, Esq.:

I am a graduate of The Citadel and University of North Carolina, with B.S. and M.S. Degrees in civil engineering. I have been in the practice of civil engineering for ten years, most of which time was spent in hydro-electrical work, including five years on the Drehr Shoals Dam. I am now employed by the D. T. Duncan Engineering Company. I have been engaged with Mr. Duncan in connection with Buzazrd Roost. I have checked and computed all of the quantities in the estimate, Defendants' Exhibit No. 7, and bid sheets, with the exception of those items dealing with electrical engineering and hydraulic equipment. In checking and computing these estimtaes (D. Ex. No. 7) I find these items are correct and sufficient, to the best of my knowledge. Those include all the items except the electrical and hydraulic.

I made a study of the power output from the Buzzard Roost project from river flow records shown in the Army Engineers' Report, and find that over this 29-year period the Buzzard Roost project can turn out 32,000,000 K. W. H. primary, and 12,000,000 K. W. H. secondary power.

I have also checked Mr. Duncan's calculations as to operation expense and believe that they are correct.

CROSS EXAMINATION.

My estimate of earth excavation is 10,000 cu. yds. I do not have the cross section showing my computation of that estimate. It is purely my estimate.

I used the 1931 drought period for my primary power studies. However, I studied the 1925 drought period which is a very low period and has occurred only once in the records. The figure of power output would require a little more than a 200 foot draw down to maintain this power through the drought period of 1925.

(286) However, I think it unreasonable to base the power output on a period that has occurred only once in history. The copies of the power contracts which Greenwood County has made for the sale of power from this plant, which you hand me, marked plaintiffs' exhibit No. 41, contains this language: "The power plant will furnish energy as agreed upon continuosly so far as reasonable, diligent, and modern equipment will permit, and agrees not to contract to sell primary power in excess of the primary power which would be available under similar stream flow conditions as prevailed during the dry period of 1925 and 1926, as indicated by government records from the stream gaging station at Chappells, from the proposed power plant as contemplated or may be enlarged." This is the first time I ever saw this provision. I would like to say that my former statement said that this power output could be maintained over the 1925 drought period but with an increased draw down. In my primary power studies, I have used a draw down of 20 feet for all periods with the exception of the 1925 drought period. The plans for the project show a normal maximum draw down of 15 feet and an extreme draw down of 20 feet.

RE-DIRECT EXAMINATION.

The railroad bridge of creosoted timber across a body of water which might well be called a lake and is a mouth of a tributary of the St. Johns River in Florida, is the railroad bridge I have in mind. The water is about two hundred feet wide there and quite deep. The A. C. L. Railroad has a bridge across this tributary, and it is all creosoted timber, with approach fills on each side.

The effect of the development of the proposed reservoirs on the Saluda River above the Buzzard Roost project, if they are developed, will, of course, increase the primary power of the Buzzard Roost project considerable.

I used the stream flow data at Chappells reduced 15% to take care of adjustment in drainage area. It is my personal view, however, that the reduction should be nearer 5%.

(287) F. H. H. CALHOUN, a witness for the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By D. W. Robinson, Esq.:

My home is at Clemson College. I am head of the Department of Geology. I got both of my degrees, B.S. and Ph.D., at the University of Chicago. I was on the Geological Survey for four years.

CROSS EXAMINATION.

At the time I made my report upon the geology conditions connected with the Buzzard Roost project, the record of the borings at the dam site and spillway site were not available to me. So far as the drill itself is concerned, if none of the core is recovered you get no information from the drilling. The sample of quartzite (quartz schist) introduced in evidence was taken from core drilling No. 5 which is located under the lower edge of the power house. This sample came from the bottom 15 feet of this hole. This quartz schist is a very satisfactory material for foundations, but the power house foundation is not subject to as severe conditions as the spillway, especially at the toe of the spillway.

As an engineering geologist I would not recommend the construction of a spillway unless you had durable rock at the toe of the spillway. Hole No. 3 of the core drillings is located on the lower side of the spillway at the toe of the spillway. In this hole massive quartzite was recovered at elevation 364. The foundation under the major part of the spillway is at elevation 400. In this hole No. 3, out of a total depth of 52 feet of mica schist, above the quartzite found at elevation 364, less than 5 feet of core was recovered.

RE-DIRECT EXAMINATION.

The presence of mica schist at the point where I found it indicates that the same type of mica schist is present at the core borings. If you get that you would certainly get that same rock as you go down the core.

As a geologist, after examining the location itself, after seeing this record of core drillings, and samples

(288) from the core drillings, in my opinion, the foundations at the point of the toe of the spillway are satisfactory. In my opinion, the foundations at the point of the powerhouse are satisfactory.

In my examination of the location and in my examination of the core drilling, in connection with the geology of the foundations, I found nothing to indicate that there was anything dangerous from a geological standpoint.

RE-CROSS EXAMINATION.

The sample which has been introduced in evidence is the only sample from the six core drillings which I have examined. If actual core drillings and recoveries from the core drillings conflict with surface indications, the core drillings are more reliable, but you have to take into consideration the kind of rock you are going through. If in a certain area the geology is very uniform, you can be pretty sure what you are going to have under ground from surface indications. Mica schist is a very friable rock although it may be very hard rock and in going through like this you are likely to crush it.

Usually in the case of most dams, when the faundation is uncovered and excavated, conditions are found which were not anticipated and could not have been anticipated from a surface examination. You never can be absolutely sure how satisfactory the foundation is going to be before the actual excavation is made. You have got to, as you go along, develop your engineering technic to conditions.

A. C. BRUCE, witness for the defendants, testified as follows:

DIRECT EXAMINATION.

I am appearing here at the joint request of Greenwood County and the Public Works Administration. I graduated from the U. S. Naval Academy in 1922 and was commissioned an ensign in the Navy. I resigned in the fall of 1922 to take a job with Hugh L. Cooper & Company. I was in the New York office for a year on detail

(289) design and model testing for Wilson Dam draft tubes. I spent three years at Wilson Dam as inspector for H. L. Cooper & Company, covering all phases of the construction from drilling and testing the foundations to the final installation and testing of the turbines. After the completion of Wilson Dam, I took a job with the Arundel Corporation as Resident Engineer on the relocation of 16 miles of the C. N. & P. D. R. R. in connection with the Conowingo Dam. This work included the construction of three railroad bridges, three tunnels, and various other items such as the jacking and raising of over one mile of track under heavy traffic conditions. From there I went to the Saluda Dam as Resident Engineer for the Arundel Corporation for three years during the entire construction of the project. After that I spent eight months on the Safe Harbor Dam, which the Arundel Corporation was constructing at the time. In addition to the duties of resident engineer, I also had charge of the cost accounting on both the Conowingo and Saluda jobs. I started with the Federal Power Commission in September, 1933. My main work there has been economic studies and reports on the hydro-electric projects. This work included studies of the power and market available, the estimated cost, the design, stability and safety of the structures, estimates and comparisons with the cost of the steam electric energy and economical analysis of the projects. A large part of these studies and reports have been in connection with P. W. A. power project applications, which have been referred to the Federal Power Commission for investigation, report and recommendation. I have also prepared reports on license aplications and examinations as to the ligitimate investment in licensed projects.

The Greenwood County project was first referred to me when the County filed a "declaration of intention" to construct the project in December, 1933. After investigation the Commission found that the interests of interstate and foreign commerce would be affected by the proposed construction and therefore the County could not proceed until obtaining a license from the Commission. Later in December, 1933 the PWA referred the application for a loan to the Power Commission for investigation, report and recommendation. I made a study of the project, the power and market available, the

(290) cost, and the comparative cost of steam electric power, and found it to be economically reasible and self-liquidating. In accordance with my recommendation the Commission recommended to the Public Works Administration that the loan be made. In February, 1934 the County filed an incomplete application for license with the Commission and revised and completed the application, in September, 1934. At this time the question of the design, stability and safety of the structures was investigated and checked by the Engineering Division of the Federal Power Commission and found to be satisfactory. The license application together with the plans, maps and other data were refered to the Chief of Engineers, War Department, and the design, stability and safety of the structures were found to be satisfactory by his department. I believe the Secretary of War and the Chief of Engineers signed and approved the drawings in October, 1934. The Commission issed a license in November, 1934. The Commission, in accordance with the license issued to the County and through its field representative, the Division Engineer, War Department, located at Norfolk, Va., will have control over the construction of the project. Since coming down here for this hearing, I have again carefully examined the bids and estimates of the County Engineers and find them to be sound. I believe the project can and will be constructed for less than the estimated cost of $2,852,000. I make this statement after careful consideration of the testimony and estimates offered by the Duke Power Company's witnesses. With regard to the annual costs as estimated by the County, they appear to be very conservative. The operation and maintenance costs and the insurance are approximately equal to the similar cost as set up by the witnesses of the plaintiff. By comparison with the operation and maintenance costs of various operating companies, which I have examined, these costs as set up by the County are very conservative.

As regards the power available, the 30,000,000 K. W. H. primary and 11,000,000 K. W. H. secondary are conservative estimates of the power that will be available for sale to the prospective customers of the County.

Should the County have to pay taxes to the extent of $5,000 and set aside a total amount for depreciation

(291) and contingent funds of $20,000, the net annual surplus of $120,000 as set up by the County would be reduced to $95,000. Without doubt the project is self-liquidating, economically feasible and engineeringly sound.

(Plaintiffs object to the parts of Mr. Bruce's statement which referred to estimates, conclusions, etc., of other engineers; also to the part of his statement which expresses an opinion or conclusion as to the testimony offered in the case by the witnesses of plaintiffs.

Taken subject to objection.)

At the time the application for the Public Works loan to Greenwood County was presented, I made a study of the cost of power to the proposed consumers of the County under the existing rates from information furnished by the applicant and by the South Carolina Railroad Commission. At that time I believe the average rate of the power companies was approximately 13 mills to the proposed customers of the County, However, the rates have been reduced since then to some extent. The information furnished by the South Carolina Railroad Commission consisted of the schedule of the Duke and Southern Power Company rates.

In connection with the Piedmont Municipal Development in the Piedmont section of North Carolina, the proposed project of a 60,000 K. W. H. steam plant, there was approximately a hunderd textile mills in that territory of that project. At that time, in making that study I used the Duke rates effective September 1, 1934, in North and South Carolina as submitted to the rate survey of the Federal Power Commission, which also coincided with the rates that the applicant stated in the application. In this study I found that the average rate to those textile mills was approximately 11½ mills. The high rate—the maximum rate on the schedule—was 12¼ mills. The low rate was 9-2/10 mills. That was for the larger consumers in that territory which the Piedmont Municipal Development proposed to sell.

CROSS EXAMINATION.

The first hydro-elecric work on which I was em-

(292) ployed was with Hugh L. Cooper & Company in 1922. I worked in the drafting room on designs for the Wilson dam. I have never had a position where I had the responsible charge of the design of a hydro-electric power development, and have never been directly in charge of the construction of such a development. After leaving Hugh L. Cooper & Company I was resident engineer for the Arundel Corporation in the relocation of 16 miles of railroad where we had to build crossings over a reservoir. In building these crossings we did not use any wooden trestles at all but used concrete culverts. The railroad we relocated was a branch of the Pennsylvania Railroad and the engineers of the railroad designed and inspected the crossings.

I went with the Federal Power Commission in 1933. The original application of Greenwood County to the PWA for a loan was referred to the Commission. The original project would have been confined to Greenwood County alone. We went into the economics of the development and made a study of it and I think the plans at that time were not in sufficient detail to approve as plans. However, we did make a finding and a statement to PWA that the project was economically sound and feasible. I have no copy of the report we made to the PWA. The statement in my direct examination that the PWA referred the application for a loan to the Power Commission and that in accordance with my recommendation the Power Commission recommended to PWA that the loan be made has reference to the orignal application of Greenwood County for a project which would be confined to Greenwood County alone. I do not remember on which side of the river the power house was to be located according to the plans which accompanied this application, but I do know that it has since been moved to another location entirely. Since the original application was filed the entire layout of the project has been substantially changed. Later on the County filed an application with the Power Commission for a license, and I stated on direct examination that the design, stability and safety of the structures were investigated and checked by the engineering division of the Power Commission and found to be satisfactory. This was done by myself and by Mr. Harry Smith, Assistant

A. C. BRUCE.

(293) Chief Engineer of the Power Commission. I have no copy of the report which I made on the structures.

In my direct examination I stated that the license application and plans of the County were referred to the Chief of Engineers of the War Department, and the design, stability and safety of the structures were found to be satisfactory by his Department. I have not with me a copy of the letter of the Chief of Engineers. According to the plans which were submitted to the Chief of Engineers the fuse plug was located on the Laurens side adjacent to the spillway, and it has since been moved to an entirely new location.

The original location was not faulty but the new one is better. A large part of the data used by us in approving the original application was data outside that in the application.

Figuring 1-2/10 pounds of coal per kilowatt hour of power, at the present price of coal ($5.00 per ton) would make a kilowatt hour generated in a modern steam plant cost three mills. I have had no experience in designing steam plants for the production of power and have never operated a steam plant.

I don't remember whether the Chief of Engineers in his letter to the Power Commission disapproved of the use of a fuse plug and recommended that sufficient gates be substituted and that a competent hydraulic engineer with experience along this line be employed to study the project in this respect before final approval. I don't remember his words or any statement exactly to that effect. I do remember that he did say that he thought there ought to be more gates at that time. However, he later approved the drawing as shown. (Plaintiffs duly objected to the statement that the Chief of Engineers later approved the drawing as shown).

I have made studies of projects similar to the Buzzard Roost project, but I have never designed one that has been contructed and have never been responsible for the design of such a project. I think the land can be acquired for the estimated figure. I have never been charged with the responsibility of maintaining a railroad bridge over a reservoir. I have never operated a hydro-electric plant and have never had the responsibility of marketing the power of such a plant.

I have never known the PWA to approve a loan and

(294) grant unless the rates of the applicant would be lower than those of private utilities with which the applicant would compete. The rates must be lower than the Power Company rates, because otherwise they would not be economical. The rates of Duke Power Company to textile mills, to which rates I referred on my direct examination, are the rates contained in the Power Company's Schedule 1-A. These rates start at 12¼ mills and run down to 7¾ mills.

I stated on my direct examination that I thought this Buzzard Roost project should set up a depreciation allowance not exceeding $20,000 a year. I have not had any operating experience with plants of this kind or with transmission lines and substations such as this plant would have, on which to base my opinion as to this depreciation allowance.

RE-DIRECT EXAMINATION.

The changes which the County has made since the original application have improved the project. In addition to the revenue which the County would obtain from the sale of primary and secondary power they should obtain some revenue from the Lexington Water Power Company under the provision in the Federal Power Commission's license that a power project shall pay something for the benefit it obtains from headwater development. The calculation of the amount of this revenue is intricate and I am not prepared to say how much it would be.

CLARENCE E. ROSE, witness for the defendants, testified as follows:

DIRECT EXAMINATION.

I have degrees in both Electrical and Mechanical Engineering from Cornell University as well as LL.D. degree. The first fifteen years of my professional experience was with Ford, Beacon and Davis, Engineers, Inc., of 30 Broad Street, New York City, then I served as a Private Consultant for six years, and thereafter three

(295) years with the Studebaker Interests, at Chicago. The last two years I have been an Engineer-Examiner in the Engineering Division and was later assigned to the Electric Power Board of PWA in Washington. The testimony which I present represents the consensus of opinion of the Engineering Division of PWA at Washington, D. C., and not mine only.

(In view of that statement, plaintiffs object to the testimony of the witness in so far as it purports to represent the views of any one other than himself.

Taken subject to objection.)

Clearing—We arrived at our conclusions after carefully checking the three counties involved with the United States Forest Service and the United States Geological Survey, and in particular with their foresters and engineers who had made surveys in this section of South Carolina, and believe that 8,000 acres of land can be cleard at $20.00 an acre as an average, which yields $160,000.00.

Hydraulic—turbines, scroll cases, governors, electric generators, exciters, switch gear and step-up transformers were estimated by PWA to cost $571,580. This estimate was substantiated by actual bids which totaled $520,020 delivered and erected. This last figure is $51,560 less than our estimate and $213,551 less than the estimate of the Duke Power Company sent to President Roosevelt.

Transmission line loop as specified by PWA will be supported by 50′ galvanized steel towers. The South Carolina State Rural Electrification Authority has undertaken to develop the Rural Electrification formerly considered by this project. Therefore we have eliminated it herefrom. If the Rural Electrification Authority does not assume this portion of the cost of this project, ample funds are provided herein therefor.

Unit Costs: The following unit costs were used for PWA:

(a) Earth excavation $0.99 per cubic yard.

(296) (b) Rock excavation 434 per cubic yard.

(c) Concrete weighted average value of classes A, B, & C concrete 13.25 per cubic yard.

(d) Reinforcing steel, placed 4.7c per pound.

(e) Cost of purchasing station building 40c cubic foot.

Bids have been received for the construction of the dam, pen-stock, surge tank, spillway and power station building, etc., the lowest of which was $622,190, whereas PWA's estimate was $790,960, and the Duke Power Company's first estimate was $932,034, and its second estimate of $1,082,031 as sent to PWA.

The Safety of the Dam has been checked and approved by the PWA and the Engineer Corps of the United States Army.

We estimate that this project can be constructed at a cost of $2,513,575, which leaves $338,755 for any possible contingencies. Revenue, Operation Expense, Maintenance and Net Income PWA estimates annual sale as follows, with 10′ draw-down:

Firm electrical enregy sales:	Per Year
To municipalities, 10,800,000 KWH at 8.2 m./KWH	$ 88,670
To industrial customers 18,198,00 KWH at 6.5 m./KWH	118,290
Secondary electrical energy 15,000,000 KWH at 5 m./KWH	75,000
Total estimated revenue, first year	$281,960

Operation and Maintenance: (Office)		Per Year
One manager	$4,000	
One bookkeeper and stenographer	1,200	
Office supplies	720	
Telephone, telegrams and postage	900	
Rent and heat	1,200	
Misc.	600	
		$8,620

(297) Hydro Electric Generating Station:

One Supt.	$3,600	
Three engineers	3,600	
One helper	900	
Maintenance	12,000	
Misc.	5,500	
		25,600
Transmisison Line:		
One line foreman	$1,800	
Two linemen	3,260	
Two groundmen	2,540	
One meter reader and tester	1,500	
Supplies	3,100	
Maintenance	4,000	16,200
Total		$50,420
Fixed Charges:		
Debt service per year for 25 years	$138,000	
Insurance	2,900	
Taxes	3,240	
		$144,140

Recapitulation:

Revenue		$281,960
Operating expense and maintenance	$50,420	
Fixed charges	144,140	194,560
Net Income first year		$ 87,400

The Public Works Administration does not require a reserve to be set up for depreciation except when local statutes require this to be done.

In South Carolina we find this to be the case, and we therefore deduct from the above estimated net income as follows:

Net income for first year	$87,400
Annual Depreciation	20,000
Balance to surplus account	$67,400

It is reasonable to add thereto an estimated incremental increase, annually, of 1%/year. This would yield

(298) for the 25 years loan interval a mean balance to surplus per year of $76,240. Since protests have been presented we have re-studied this project, and are fully convinced that it is both technically and economically sound and we recommend it more strongly than ever.

I have carefully examined the electric rate schedule of the Duke Power Company, and find only Block Meter Schedules except Schedule #10, which is applicable only to resale customers. Block meter rates for large industrial customers are 30 years behind in modern electric rate theory. Again the Duke Power Company has spent thousands of dollars, is now spending more thousands of dollars, and stands ready to expend still more thousands of dollars todefeat this project. Therefore it is at once apparent that the Duke Power Company recognizes a great deal of merit in the project.

This statement represents the consensus of opinion of the Engineering Division of the PWA and it also represents my personal views entirely.

I made the calculations which I have given in evidence on the basis of a 10 ft. draw-down. If a 20 ft. draw-down is used it will give you more firm power and more secondary power.

Since I have been here I have had the PWA confirm what I have said with regard to depreciation. This confirmation was by two telegrams to me from Mr. McDonough, Director of Engineering.

(The plaintiffs objected to the introduction of these telegrams. Admitted subject to objection).

First telegram, dated June 14, 1935, read as follows:

Re your telegram, June thirteen Docket Thirty Nine Seventy Two you are correct PWA never requires borrowers to set up any deficiency funds unless such are required by local statute and then insists such deficiency funds to be kept to minimum STOP This attitude based on opinion it is unnecessary to accumulate deficiency funds as when a project is completely expended borrower may again use its credit to borrow for rehabilitation or replacement STOP Approval of this particular project did not contemplate setting up deficiency fund".

(299) The second telegram, dated June 15, 1935, reads as follows:

"Clarification of telegrams of June fourteenth STOP Should read PWA never requires borrower to set up any depreciation funds unless such are required by local statute and then insists that such depreciation funds be kept at a minimum STOP This attitude based on opinion it is unnecessary to accumulate depreciation funds as when a project is completely worn out borrower may again use its credit to borrow for rehabilitation or replacement".

In making my calculation of the estimated revenues I took into consideration the figure for head water development which the Lexington Water Power Company may have to pay Buzzard Roost. I went over to the F. P. C. and discussed it with Mr. McWhorter, and he stated that there certainly would be a payment required. I discussed the amount, and he said that would have to be determined after the project was built—to determine the additional firm power which the Lexington Water Power Company could put out after this project was completed.

It storage basins for power developments are built above Buzzard Roost on the Saluda River, for instance at Upper Ware Shoals, the effect on the production of power at Buzzard Roost when these projects are built would be to tend to smooth out the water curve, and would benefit the project, and would increase the firm power.

My details of my estimated cost bring the total up to $2,852,330 approximately, with $356,375 contingencies.

(The details of this estimate appear in the cross examination of this witness at page 174).

P.W.A. has sold $83,000,000.00 in bonds which have yielded above par a premium of $4,000,000.00 up to May 1, 1935.

CROSS EXAMINATION.

I stated on direct examination that I have carefully examined the electric rate schedule of the Duke Power Company and find only block meter schedules, and that such rates for large industrial customers are 30 years

(300) behind the times. That is the consensus of the PWA opinion of the Duke rates. It represent the consensus of the PWA opinion as to the Duke rates, but I dictated that opinion. The PWA considers the character of the Duke rates essential and material to this case. They are so considered for this reason: You take Schedule No. 1 and apply that to a hypothetical load the Duke Company had around here last week of 25 Kilowatts maximum demand, and that will yield 9 mills. If you apply Duke Schedule 1-A, which has certain discounts that the other schedule doesn't have, that will yield 8-6/10 mills, and if you apply Duke Schedule 10 it will yield 9-6/10 mills. The Duke Company will be the only competitor of the Buzzard Roost project, so we estimated a rate schedule for the project which would yield 6.5 mills for the industrial consumers of good load capacity, and 8.2 mills as a municipal rate, both of which are under the Duke rates. The Duke rates do not meet with the approval of the PWA authorities. We think they are excessive, and it is because we think they are excessive that the PWA approved this grant. That is one of the reasons for the approval of the grant. As to whether, if the Duke rates had met with the approval of the PWA authorities the loan and grant would have been approved, I can say that we (meaning PWA) have never approved a project where a privately owned company has made a satisfactory adjustment. That doesn't mean we will not. It is the policy of the PWA not to approve loans and grants where privately owned utilities have reduced their rates satisfactory to the PWA, and it was in line with that policy and because of that policy that I made the investigation as to the Duke rates. Rural electrification in South Carolina is low; only two per cent of the farms have rural electrification.

As to the policy of the PWA authorities in prescribing rates before approving a loan and grant, the procedure in Washington is this: I design the rate schedules, or nearly all are designed by me. We condition our reports and when a project is constructed those rate schedules must be applied. When an application is made for a loan and grant for a power project the PWA authorities investigate the rates for that project and prescribe the kind of rates the project must put into effect—the kind, the class, and the type of rate. The engineers of the PWA authorities fix the rates, and the PWA au-

(301) thorities do not approve a project unless the rates approved by its engineers are put into effect. The loan is conditioned on the rates being put into effect, and the rates fixed by the PWA authorities must be adhered to for the length of the life of the loan unless the borrower gets approval from Washington to change the rates. That adherence is a condition of the approval of the loan and grant.

In my direct examination I gave the following details of my estimate of $2,852,330 for the cost of the project:

"Preliminary expense	$ 7,000
Land and bridges	360,600
Clearing dam site	3,320
Access railroad	6,440
Dam	181,520
Penstocks and surge tanks	203,120
Power house, spillway and power station building	406,320
Hydraulic turbines, scroll cases, governors, electric generators, exciters, switch gear and step-up transformers	520,020
Transmission lines	314,500
Substations	162,000
Contractors' profit	125,000
Operators' housing	16,500
Shops	7,620
Two trucks and two autos	7,500
Engineering	60,000
Legal and administrative	30,000
Interest during construction	60,000
Contingencies	356,375

In the item of $360,600 for land and bridges I included the three bridges of the railroads over the Saluda and other bridges down there and the highway bridge. In estimating the cost of the land we (PWA) took the estimate of the applicant, Greenwood County. I cannot tell you what I included in the estimate for the railroad bridges. I haven't got my work sheets here. I just brought down this summary. (Referring to the figures given above.) My estimate in regard to raising the bridges was based on information obtained from conversation with employees of the Interstate Commerce Commission. I cannot name the men I talked to. I

(302) have never designed a railroad bridge, and am not familiar with the inspection and maintenance of wooden trestles. I have no data with me showing what changes the PWA would propose to make in the Seaboard bridge over Cane Creek. I think it was to be raised to a level of 445. It was our idea in Washington to begin far enough back and raise that bridge to 445 and to fill in approximately that trestle. That was the PWA idea. The individuals in the PWA that formed the idea were Major Oldsburg and myself. We were going to make that change on the present location under running traffic. I cannot tell you how much of the $360,600 shown in my estimate of cost under the item "land and bridges" is for land and how much for bridge changes.

Referring to my statement that I propose raising the Seaboard track over Cane Creek to elevation 445 I am not satisfied that that would be the elevation of the rail head. I would have to see the drawings we made and the details before I could answer that. The estimate about which I testified on direct examination was not very evenly pasted together by the stenographer, and included in the total of $2,852,330 there is an item of $160,000 for clearing which I did not include in my direct examination. Including this item I still get $2,852,330 as the total cost of the project, and there is still left an item for contingencies amounting to $337,040.

In giving the cost of clearing the reservoir I figured that there were 8000 acres to be cleared at an average cost of $20.00 an acre. As to the cost of the clearing I got the figure of $20.00 an acre from men in the U. S. Forest Service and U. S. Geological Service, who had actually been over the project. I can't name them. I do not know whether he has ever done any clearing. I am satisfied the men in the U. S. Geological Service with whom I talked about the cost of this clearing have never done any clearing. It is not in their line. I have never been in charge of the clearing of a reservoir site. I also talked with men in the U. S. Forest Service. I am not prepared to say whether they ever did any clearing, or whether it is in their line of duty to do clearing. Major Oldburg and I worked on this dam together. He has built the biggest dam in the world—Leguna.

I have been responsible for a dam—the Remel Dam.

(303) Two of us worked on it. I contributed as much as he. William Von Poole was the Chief Engineer.

I have never been responsible for the construction of a dam. In my estimate of cost I show $181,520 for the dam. The contract bids which the County has obtained for this item of the work amount to $239,331.

In my estimate of cost I show an item for penstocks and surge tanks amounting to $203,120. As to the question whether there are any penstocks and surge tanks in the Buzzard Roost development, the item "penstocks and surge tanks" shown on my estimate is a typographical error. In the statement I read as a part of my direct testimony I stated, "Bids have been received for the construction of the dam, penstock, surge tanks, etc.". That also is a typographical error. As to your question whether there are any penstocks shown by the present plans on which the County proposes to build this project I say that the plans that were sent to Washington show penstocks down to the turbines. As to whether the plans submitted to the Federal Power Commission show any penstocks, I never saw the plans submitted to the Power Commission.

I have not made my estimate of cost on the basis of the plans submitted to the Federal Power Commission, but on the basis of the plans which were sent to the PWA with the County's original application. The powerhouse has been moved downstream from the location shown on those plans. I do not know how far it has been moved. It has also been moved over the County line.

We carefully checked the new plans sent us and let our former estimates stand because the new plans and specifications were somewhat under the other. The item for surge tanks in the estimate which I have submitted was a typographical error. I don't think the item for penstocks is a typographical error. I think I am including in the estimate an item for penstocks. I don't recall what length of penstock I figured on. My recollection is that the original plans and specifications submitted to the PWA show a penstock and surge tank. The plans and specifications under which the County proposes to build this project do not provide for payment for a penstock. I will have to refer to my work sheets in Washington before I could say what I included in this item of $203,120. (The taking of testimony before the Special Master having been adjourned

(304) from Monday afternoon, June 17, 1935, to Wednesday morning, June 19, 1935, the witness was requested to be present at the next session of the hearing on Wedneday morning, and to have with him at that time his work sheets and other papers to which the witness has referred, in order that he may be examined in reference to them).

The hearing was resumed on June 19, 1935, and the cross-examination of the witness was continued as follows:

I have not yet obtained the work sheets which I referred to on Monday in the course of my testimony and which counsel for the plaintiffs requested me to obtain from Washington. I made the request by Air Mail that they be sent me but I have heard nothing from them as yet. Referring to the item of $203,120 which I show on my detail estimate for penstocks and surge tanks, in answer to your question as to whether this item covers the present waterways in the powerhouse, complete with all surrounding concrete, I say it does not cover the power station building, I believe. The penstocks, power station foundations, all the concrete work and the excavations go to that portion wherever the water is led to the wheels and from the wheels. This item of penstocks and surge tanks cover the present waterways in the power house which the County now proposes to build with all surrounding concrete and then some. The estimate containing this item of penstocks and surge tanks was made up by Major Oldburg and me when the first plans and specifications were received in Washington. Those plans and specifications did show steel penstocks and surge tanks and this item was intended to cover them. The application had been recommended by us. Secretary Ickes had approved it and the President had approved it, and then down here the plans had been changed. The allotment had been made. So Major Oldburg and I, he the hydraulic and I power, carefully checked the new plans, and found that they would cost less than the old plans, so we reported that to our superiors, and let the original estimate stand. I never saw the plans submitted to the Federal Power Commission.

(305) In my direct examination I stated that the PWA estimate for the dam, penstock, spillway and powerhouse building was $790,960, and that the bids received by the County for these items amounted to $622,190. The PWA estimate of $790,960 included the cost of flood gates, head gates, racks and cranes, whereas the bids do not include these items, so that the bid price of 622,190 is not for the same structures as those covered by the estimate of $790,960. I have also compared in my direct examination the bid price of 622,190 with what I referred to as the Duke Power Company's estimate of $932,000. This estimate was based on the County's original layout, with intake powers, penstocks and surge tanks, and with the powerhouse located on the other side of the river.. I am not certain whether it was based on a 6-gate spillway instead of a 4-gate spillway. The Duke estimate of $932,000 included flood gates, head gates, racks and cranes, whereas the bid price of $622,190 did not include these items. In my direct examination I also compared the bid price of $622,190 with what I referred to as the Duke Power Company's second estimate of $1,082,031. I haven't the second estimate to which I referred and cannot produce it. I cannot say whether this second estimate was based on 6 flood gates instead of 4 or not. It was based on earth fill entirely rolled instead of partially rolled. I think it included the cost of the diversion culvert shown on the County's drawings. It included the cost of flood gates, head gates, racks and cranes and everything completely installed except station wiring. The bid price of $622,190 covers rolling only the middle third of the dam, and does not include the cost of the other items to which I have just referred. I was also mistaken in saying that the bid price included the services of erection superintendents amounting to $5,000. I cannot say whether it included the cost of sodding the dam.

I stated on direct examination that the cost of hydraulic turbine equipment, electric generators, and stepup transformers were estimated by PWA at $571,580, whereas the actual bids for these items total $520,020, or a saving as compared with the estimate of $51,560. My detail estimate of cost shows only $520,020 as the PWA allowance for these items.

I stated on direct examination that the bid price of

(306) $520,020 was $213,551 less than the estimate of the Duke Power Company sent to President Roosevelt. I haven't a copy of the Duke Power Company estimate to which I referred. It is in Washington. I thought I had it with me. I cannot say whether the Duke Power Company estimate to which I referred included in the figure of $733,571 stepdown substations at the figure of $213,492 or not. If it did then it was within $59.00 of the bid price of $520,020.

In connection with my estimate of power output I cannot tell you how many hours a week I figured secondary power would be sold. I cannot give you that information in the absence of my work sheets which are in Washington. I cannot tell you what I allowed in my estimate for items 12, 13 and 14 shown on the County's Exhibit No. 7. That is in the work sheets which I haven't with me.

The statement which I read in my direct examination contains this statement. "The safety of the dam has been checked and approved by the PWA." That was done by Major Oldburg and me together. It was done in this way. I am a skilled mathematician and it isn't difficult for me to check calculations for a dam. Major Oldburg made the calculations and I checked them. (Plaintiffs move that the statement as to the safety of the dam be stricken out, inasmuch as it appears to be based on calculations made by Major Oldburg). The War Department also approved the stability and safety. (Plaintiffs move that the statement of the witness as to the approval of the War Department be stricken out). I have heard since I have been here that the War Department recommended the installation of additional spillway gate capacity. I have never had any experience in designing a fuse plug and fuse plug channel in earth. In estimating the firm or primary power output of the Buzzard Roost project we used a 10 ft. draw-down. We did not use all of that for primary power. I couldn't tell you how much we used for primary power in the absence of my work sheets, and for the same reason I cannot tell you when, with reference to the draw-down, I assumed secondary power would be cut off. I estimated primary or firm power on a monthly basis. I cannot tell you what load factor we used in figuring the

(307) power sales. That information is in the work sheets, and in their absence I cannot give it.

We arrived at the load factor by working it out from the list of industrial customers and municipalities.

RE-DIRECT EXAMINATION.

As a matter of fact in determining whether a loan will be made by PWA it is necessary to compare the applicant's proposed rates with the existing rates in the territory on account of competition. PWA has to see whether applicant's rates are low enough to make it worthwhile to change, and high enough to liquidate the debt and earn it some surplus.

The plans of the County engineers have been changed since the original application was made to the Public Works Administration. In my opinion those changes have improved the project.

When my breakdown estimate is reconciled with MR. Duncan's there is actually about a $100,000.00 saving on these bids.

W. A. BARNETT, witness for defendants, testified as follows:

DIRECT EXAMINATION.

I am a practicing veterinarian and am familiar with most of the territory covered by the Buzzard Roost project. I served as Mayor of Greenwood for four years. On the Greenwood side there is very little timber other than second growth. There are large trees along the banks of the river. Most of this territory has been sawed over in the last ten or twelve years.

The place on the Laurens Road owned by the Citizens Trust Company has been offered for $5.00 an acre. I think you could have bought the lands covered by the project for $15.00 an acre or less before the Buzzard Roost was mentioned. The people of this community are interested in this project. I think the people there would give anything they possibly could to see the project go through. All are unanimously in favor of it.

(308) A fair price to clear this land would be from $12.00 to $17.00 an acre.

CROSS EXAMINATION.

I couldn't tell you how many there are in the tracts to which I have referred that would be included in this development, nor have I any idea how many acres will be included in the development.

RE-DIRECT EXAMINATION.

When I was Mayor of Greenwood the question of renewing the contract with Duke Power Company arose twice. We really didn't have any difficulty in renewing the contract. It was just a matter of telling us what we would have to do, sign the contract. When I entered office the contract called for 1¢ per kilowatt hour, and the next contract we had was 1.52, and our consumption would carry it about 1.32. I guess the City Council wrestled with them for months to get a deduction of the contract. The Water and Light Commission considered making another connection. Just before I left office the rate was reduced a little. That was along about the last of March. The original contract we had was less than a cent.

RE-CROSS EXAMINATION.

The contract for 1¢ expired about 1932 or 1933. It was made about ten years prior. As to whether it was on a flat rate or on a sliding scale that is talking about something I don't know much about, that is so far as the technical part of the electricity was concerned and how the contract was drawn. Since we had the contract beginning at 1.52 under which we had an average rate of 1.32 we have entered into another contract at a reduced rate. When the rate was reduced the Power Company offered us a contract carrying the reduction.

RE-DIRECT EXAMINATION.

I would say 60% of the land on the Greenwood side is open land. You may have some bushes and things in there but I wouldn't consider them much.

(309) R. E. Mc'CASLAN, witness for the defendants, testified as follows:

DIRECT EXAMINATION.

I have been in politics in Greenwood County considerably; have represented the County in the General Assembly eight years; was Chairman of the Ways and Means Committee four years, Vice Chairman two years. I am familiar with that part of the territory known as Buzzard Roost which lies in Greenwood County. I would say about 50% or 60% of the land is cleared, that is, has nothing but briars, bushes and such on it. I think a fair average price for clearing the land would be $15.00 an acre.

CROSS EXAMINATION.

I have done some clearing of land; cleared some this year; just with my own help; I would say about ten acres; I have never had a proposition of this kind involving thousands of acres. I think the government rate for labor is 30¢ an hour.

RE-DIRECT EXAMINATION.

If the government's rate for labor is 40¢ an hour I guess it would cost $17.50 or $18.00 an acre to clear the land.

J. C. SMITH, witness for defendants, testified:

DIRECT EXAMINATION.

I am familiar with the Buzzard Roost territory, certainly from Cane Creek up to where the basin runs. Most of the land in Laurens County that would be taken in by the Buzzard Roost project has been cut over so far as saw-timber is concerned. There is only one place that I know of in the whole basin that has not been cut

(310) over in recent years. On the Laurens side 20 or 25% of the territory is in what you would call saw-timber, counting the saw-timber that would square 6 in. There is a good deal of the territory in briars, swamps and swamp bushes, and perhaps 25% in gum and small ash. Taking all into consideration there would certainly not be over 50% of what you would have to cut with axes that amounted to anything. Not over 20% of it is heavy timber—I don't think that much heavy timber. I have only had experience in clearing land on my own places. I would estimate the average cost of clearing this land on my side of the river at not over $10.00 an acre, I believe, but I do not know about the heavy. I haven't cleared anything like that. I haven't had any experience in that. I secured about 75% of the options on the land. There was no trouble at all hardly to secure them; almost none. In the area of the basin as I know it most of these lands are not worked now at all. There are very few acres that are worked. Some of them have been worked. I know my father worked corn 15 or 20 years ago, but because of the filling up of the river bed that had become so it couldn't be worked, and on account of the bushes and briars and it was utterly worthless in so far as bringing in an income to anyone. I should say that there are some bottoms that would be very valuable, but that is very little of that. I think $5.00 an acre would be a good price for most of it. I have had numbers and numbers of owners come to my office and ask me when I thought they would begin work. They were very anxious for it to go through and wanted to do anything they could.

CROSS EXAMINATION.

I have cleared some land. I paid my labor, wage hands and share croppers 50¢ and 75¢ a day, that was year before last. It didn't cost me over $5.00 an acre. I worked them mighty close from sun to sun. It was when I was getting ready to put the land into cultivation.

S. M. LEAMAN.
J. H. MILFORD.

(311) S. M. LEAMAN, witness for defendants, testified:

DIRECT EXAMINATION.

I have lived in Laurens County all my life, being engaged in the mercantile business and farming, and am familiar with the lands covered by the proposed Buzzard Roost project.

Leaving out the Buzzard Roost project I wouldn't think you could sell any of the land to be covered by the project at all. I believe you can buy every acre of it for $10.00 or $12.00.

J. H. MILFORD, witness for defendants, testified:

DIRECT EXAMINATION.

I live two miles from the City of Greenwood. Am engaged in farming and contracting. Have one farm less than a mile from the river and another about a mile and a half; these are the two closest to the Buzzard Roost project. I am familiar with the Buzzard Roost area in a general way. I have considered the question of clearing this area; have investigated it with that in view. From my observation of the property the clearing is very light so far as heavy timber is concerned. There is quite a bit of undergrowth that has been coming up for 8, 10 or 12 years. The heavy timber, or the majority of it, is on the river bank. In most places there is just a narrow strip up the river bank, but in some places it runs out. If they would give me the amount of acreage they have estimated I would love to have the clearing at around $20.00 an acre and certainly would like to have it for $25. Leaving out the Buzzard Roost proposition I would love to have the privilege of buying the land at $10.00 an acre. I wouldn't think the County would have any trouble at all in getting options and buying the entire land that they require there at $15.00 an acre.

(312) M. G. BOYLE, witness for the defendants, testified:

DIRECT EXAMINATION.

From what I know of the people in the community out there it is my opinion that the Buzzard Roost will not have any trouble in securing options at $15.00 an acre. If I had any land down there they would get it.

M. C. WILLARD, witness for defendants, testified:

DIRECT EXAMINATION.

In my opinion the County of Greenwood would not have any trouble in securing all the land they need at $15.00 an acre. They would not have any trouble so far as I am concerned.

EMMETT I. DAVIS, a witness for defendants, testified:

DIRECT EXAMINATION.

I am Secretary of Greenwood County Finance Board and have been actively interested in the Buzzard Roost project from the beginning. I have had general charge of procuring options on the property, and have been pretty well over the whole basin, but I couldn't say that I have been actually over the lands and bottoms—over the lands in details, or a great deal of it; some of it I have. I am a member of the Forfeited Lands Committee of Greenwood County which handles the lands that have been forfeited for taxes. I don't believe there has been a tract within the area that has been taken in for taxes, but there have been a number of tracts near the basin some of which the County still holds. The County took in one tract of 125 acres that is very near the water line which I have been trying to sell for two years at $1.75 an acre and haven't been able to sell it. We sold one tract of approximately 100 acres not far from the basin for $250, and I control a piece of land near the basin

(313) area which I would be glad to take $5.00 an acre for. I do not know of my own knowledge of any sales that have been made within the basin right recently. I think $5.00 or $6.00 an acre would be a liberal price for the lands within the area if there was no Buzzard Roost proposition in sight. The County experienced very little trouble in securing the options it took. It was only a rare instance that I had any trouble at all in securing an option. The people are almost if not entirely 100% behind the project, and they realize that the price of $15.00 an acre is a Godsend to them. The plan of the County in reference to the Buzzard Roost project is to sell the output primarily to the cities and urban and rural customers. I do not know of any new enterprises that Duke Power Company or Southern Public Utilities Company have brought to Greenwood County in recent years. There are only two that I recall in recent years coming to Greenwood, a cheese factory brought by local people, and a garment factory subsidized by local people to get it. At the present time the power companies are selling to the cotton mill industries in Greenwood only about 1,000,00 kilowatt hours a year; that is to the Matthews Mill in South Greenwood. I was told by Mr. Self that the Matthews Mill used from 9,000,000 to 10,000,000 kilowatt hours. A few years back Mr. Abney, who controlled the Panola Mill, and Grendel Mill No. 1, built his own steam plant. Prior to that time he was buying power from the Duke Company. The Duke Power Company is only furnishing approximately one-eighth of the power used in the County. They are at least not furnishing but a small percentage of the load that is already developed in Greenwood County. There is approximately 65,000,000 kilowatt hours consumption there, from information we have gathered from cotton mills, and probably 10,000,000 from smaller interests in Ninety-Six and Greenwood, and Duke sells approximately 7,500,000 kilowatt hours. They do not sell Ware Shoals or never have sold Ware Shoals. They have their own hydro and steam plant. I say they never have; not to my knowledge.

In securing options I have observed the timber land around about the project and I should not think there would be over fifty per cent where any material clearing would have to be done. We have options from a majority of the landowners in Newberry County.

(314) We figured on paying taxes in Greenwood County to the extent of school levies in the different districts which would be affected by the project. I estimated that this would amount to somewhere in the neighborhood of $1000 or $1200 in Greenwood County.

Defendants introduced in evidence as Defendant's Exhibit 36, Minute Book No. 1 of the Finance Board for Greenwood County, containing resolutions of said Board with reference to the Buzzard Roost project. The resolution of June 15, 1935 was passed partly on the suggestion of the PWA. The PWA didn't require and depreciation funds set up, except as may be required by local statute.

The total acreage that we ever had an option on, including the options that have expired and those that have not, is approximately 11,940 acres, and the average price of those is $15.83 per acre. I estimate that we have never had options on approximately 1500 acres. The agreements we have with Newberry and Laurens as to sharing profits on power consumed and used in their territory are in writing and copies of them have been furnished the plaintiffs and introduced in evidence.

CROSS EXAMINATION.

There are no other agreements with Newberry and Laurens except the written agreements which have been introduced in evidence. My information is that at present about 10% of the power used in Greenwood County is furnished by the Duke Company, and about 90% is furnished from other sources. In the County's application to the Federal Power Commission for a license there is given a list of customers with whom the County has made contracts for power, and all of the customers there given are customers of the Duke Power Company except rural electrification, 500,000 kilowatt hours, and the secondary power contract made with the Grendel Mills. Except the secondary contract with the Grendel Mills the County has not entered into any contract for the sale of power with any of the customers included in the 90% of power consumption in Greenwood County not now furnished by the Duke System. The County now proposes to extend its transmission lines to Goldville. The mills of Goldville are customers of Duke Power Company. So far as I know the Duke Power

(315) Company has met every demand or request for power which has been made on it in Greenwood County. According to the present plan of the County the powerhouse, spillway, approach to the powerhouse, tailrace canal, and step-up transformer station will all be located in Newberry County. We have no written agreements with Newberry or Laurens Counties with reference to the levy of taxes on property in those counties constituting a part of the project.

J. B. SLOAN, a witness for the defendants, testified:

DIRECT EXAMINATION.

I am 57 years old; was born in the Ninety-Six section of Greenwood County. Have been in the banking business for thirty-six years. Connected now with the Bank of Greenwood.

I would say that the lands in the territory covered by the Buzzard Roost Project are worth from $5.00 to $10.00 an acre.

About fourteen or sixteen years ago the Town of Ninety-Six, ambitious to grow, thought it was entitled to better electric service and approached Duke Power Company with regard to getting electric lights. I was on the Committee that negotiated with the Company. Duke took the position that the proposition was too small and entailed a possible liability and would not fool with it, but after a lot of persuasion and negotiations they agreed that they would sell the town power provided the town would buy and install the transformers at its own expense. When we went to renew the contract with the Duke Power Company they took the position that Duke must own the transformers. If they put in their own transformers the town's transformers would be worthless and therefore the transformers which cost the town $10,000 were sold to the Duke Power Company for $4,000.

Speaking as a taxpayer I do not regard Duke Power Company's service at Ninety-Six as adequate service.

With the exception of a few lines running out of Greenwood, Ninety-Six and Hodges there is no rural electrification in Greenwood County. I have heard of no arrangement being made by Duke Power Company to put in any.

CROSS EXAMINATION.

(316) I don't remember what revenue Ninety-Six was able to offer Duke Power Company at the time the original contract was made. The nearest transmission line of the Power Company was about a mile from the center of the town, possibly a quarter of a mile from the town limits. The town wanted to buy current from the Company to be distributed by the Town. I don't know whether the Railroad Commission fixed the rates at that time or not. I don't know whether the Power Company allowed the town a 10% reduction on account of the town putting in the transformers—not that I know of. When it came to renewing the contract I understand that the Railroad Commission had established the rates, and that under those rates it was contemplated that the Power Company would own its own substation, and the Power Company paid the town $4000 for the transformers which were ten or fifteen years old.

EVIDENCE FOR THE PLAINTIFFS IN REBUTTAL.

J. M. COSTELLO, a witness for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

At present I am Treasurer and Auditor of the Lexington Water Power Company, which company constructed and owns the Lake Murray development. I have a record of the cost of clearing that reservoir.

Q. What was the cost of clearing the reservoir?

Mr. W. D. Robinson: We object to this testimony upon the ground that it is not within the witness' personal knowledge, and on the ground that this testimony is not in reply, in that the matter of clearing was gone into in chief.

Taken subject to objection.

A. $1,597,989.36 as of December 31, 1931, in accordance with the records of the Lexington Water Power Company.

(317) Q. Are those records kept under your supervision? A. They are.

Mr. D. W. Robinson: We object on the further ground that the best evidence would be the production of the records.

Taken subject to objection.

I have these records with me. They are our original records kept under my direct supervision. I would hesitate to offer them in evidence. I have them available for examination by counsel for the defendants.

A total of 44,666.2 acres were cleared at an average cost per acre of $35.78. At the time this clearing was done common labor was paid 20¢ an hour. As to what part of the cost I have given represents overhead expense, I would say that in the total figure of $1,597,989.36 there is included an amount of $82,069.34 representing the engineering fee. The balance of the cost represents the direct costs in connection with the clearing. Roughly, this $82,000.00 is between 5% and 6% of the total cost.

Q. Now, Mr. Costello, what is the acreage of this development under normal water line?

Mr. D. W. Robinson: We object to that on the ground that this is not in reply, upon the ground that the witness doesn't know it of his personal knowledge, and upon the ground that the original records would be the best evidence.

Taken subject to objection.

A. At elevation 360, that would cover in that area 52,000 acres.

Q. And what was the total acreage acquired by your Company for the purpose of the development? A. Approximately 98,000 acres.

Q. Are those figures as to acreage based on your own knowledge, or the original records of your Company? A. They are based on the original records of the Company.

Q. Have you those records here? A. I don't have the records available with me, but they are distinctly shown by the records of the Company which are in Co-

(318) lumbia. Furthermore, if I may say so, as to the acreage, it is part of the record before the Federal Power Commission.

Mr. D. W. Robinson: We move to strike that out.

Taken subject to objection.

Q. Have you any records there showing the percentage of the clearing in the reservoir done by contract, and the percentage done by the Company?

Mr. D. W. Robinson: We object on the other grounds.

Taken subject to objection.

A. Approximately 60% was cleared by individual contracts, and the balance was cleared by the Company.

CROSS EXAMINATION.

These records that I brought represent our cost records on that development. They represent the original entries from the cost records themselves as we maintain a dual record. We carry two records: a detail of cost record and another one of primary accounts. The particular record I have here in evidence is the record of cost. It is confirmed in its entirety by our original records.

Mr. D. W. Robinson: I am making this examination subject to my objections.

The reference here is to either accounts payable vouchers, journals or payrolls. Those are our original records and you take those off and put on your ledger sheets. In so far as you refer to original records our payroll, of course, is the original but if you go into that source you naturally have to go into our time tickets and to bring along information of that character would be almost physically impossible. We have the original also but it is not here. The Duke Power Company under two contracts has contracted for 50% of our output at Lexington. I would not construe those auxiliary ex-

(319) penditures as "overhead". They represent our field office, our garage, and our shop expenses. The record for the year 1930 reflects these expenditures as clearing land for reservoir—auxiliary expenditures. On the lower sheet they are marked "overhead" expenses but the reference to "overhead" had particular reference to what was construed as field overhead—the field office at the dam, the garage, the shop expenses, and also the expense incurred in the office in Columbia.

These figures were presented to the Federal Power Commission for approval. They have recognized that the information I have given conforms to their examination that this was a cost incurred to the company. The Federal Power Commission has proposed the elimination of a certain proportion of that cost. Now, this examiner was admittedly just an accountant. He was not familiar with existing conditions in our clearing operations. His disallowance represented a disallowance of over $20.00 an acre which he construed, as I recall, that the company should not have expended over $20.00 an acre. He was not familiar with the fact that the contractors only cleared the light areas and were not equipped to cover the heavy areas which the company had to clear. I, myself, am an accountant. Roughly, I would say that we paid $20.00 per acre for the portion of land cleared under contract.

RE-DIRECT EXAMINATION.

There was no comparison between the clearing done under contract and the clearing done by the company. The clearing done by contract was done by individual farmers of this area. For the clearing done by the company, it had to have special equipment to get into this low swampy area. As a matter of fact, we tried contracting and were only successful in contracting out the light material. The average cost of clearing the heavy area was $42.00 an acre. The total amount of this auxiliary expense, which included the engineering fee, aggregated $275,373.98. The records which I have shown Mr. Robinson would be what I would construe as the original records in connection with this development. They are our original ledger records, insofar as they are a part of our general accounting records in connection with the cost of the development. I tried to state formerly, our

(320) accounting records represent journals, ledgers, certain definite detail records, and also cost records. In other words, they are composed of several kinds of records all of which I would consider original records.

CHARLES S. REED, a witness for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am employed by the Duke Power Company and am a director of that company. I have been regularly connected with the Duke Power Company for a little over a year. Prior to that time I was a consulting engineer specializing in gas and electric rate cases, appraisals, and financial examinations. During the 8 years I was in business for myself, and my previous experience of 15 years with the Doherty interests, my experience included rate appraisals and financial examination work for more than 50 companies operating in more than 30 states. That covers my experience briefly.

Q. To make it brief, Mr. Reed, did you hear Mr. Rose's criticism of the Duke Power Company rates—

Mr. D. W. Robinson: Mr. Master, I wish to interpose my objection to this question, and ask that it run through the testimony of this witness and other evidence in reply, on the ground that all the questions in the case were gone into by the plaintiffs in chief, and under the rules of this Court it is not proper for these matters to be gone into in reply.

Q. —on the ground that they were thirty years behind the time? A. I did.

Mr. Rose offered the Hopkinson demand type rate as the proper rate. The textile rate of the Duke Power Company, the 1-A rate, which is the one mentioned most often, has the most desirable features of the demand rate, which is the fact that it gives a low rate to customers with good load factors, but it doesn't contain the undesirable feature which is that it increases the bills of a large number of customers. If the Duke Power

(321) Company were to put into effect the Hopkinson demand rate, to which Mr. Rose refers, it would increase the rates of a good many of the Duke customers. The Duke customers are given all the features of the Hopkinson demand rate which result decreasing the bills and are not penalized with any features that would increase the bills.

I heard Mr. Rose's testimony as to rural rates in the United States.

Q. Do you know the type of service which is covered by what is commonly referred to as the average rural rate in the United States? A. The definition of that varies. It is generally considered to be the service to small communities and rural territory, but the census figures, as I understand it, also include a large amount of pumping in the territories in the western states.

Mr. D. W. Robinson: Objection. We move to strike that out.

Taken subject to objection.

Q. Mr. Reed, how does the average rate in the western states, where this power is used for irrigation or for pumping, compare with the rates for rural service in the eastern United States? A. That we may explain by separating the rural service east of the one hundredth meridian, which passes through Nebraska and Kansas, from the territory west of the one hundredth meridian. East of the one hundredth meridian, the average rate per kilowatt hour for rural service is 6.6 cents, and west of the one hundredth meridian, the average rate is 1.8 per kilowatt hour. The census figures are for the year 1932. The prices for the year 1934 show 6.12 for east of the one hundredth meridian, and 1.62 for west of the one hundredth meridian.

Mr. D. W. Robinson: Let me interpose an objection on the ground that the census records themselves are the best evidence.

Taken subject to objection.

The reason for the difference in the average rate is

(322) the very low rate in the State of California, and the enormous quantities that have been sold there, for irrigation purposes. The rural rate in the Piedmont territory would not compare with the average rate for rural service for the entire country—for the western United States. It would compare more favorably with the figure for the eastern half.

The average price received by the Duke Power Company, and prior to the consolidation by the Southern Public Utilities Company, for rural service for the year 1934 was 4.4¢ per kilowatt hour. The reduction in 1934 was applicable to rural rates but that occurred in September so that these figures include only four months of the rate reduction. If the rate reduction had been applied for the entire year, the average price per kilowatt hour would have been close to 4¢. If the Duke Power Company should apply to its rural customers the rate mentioned by Mr. Rose of 3¢ per kilowatt hour with a minimum rate of $4.25 per customer, this rate would raise the bill of the Duke customers about 55%; that is the farm and rural resident customers. The rural rates of the Arkansas Light and Power Company referred to by Mr. Rose are more than 30% higher than the rates of the Duke Power rural service. The rates of the Mississippi Power and Light Company, referred to by Mr. Rose, are more than 33% higher than the rural rates of the Duke Power Company. As near as I can find out, the New Orleans Public Service Company has no rural rates as referred to by Mr. Rose and furnishes no rural service whatsoever. The territory outside of New Orleans is supplied by the Louisiana Power and Light Company. The rates of the Louisiana Power and Light Company for rural service are 36% higher than the rates of the Duke Power Company. The textile rates of the Duke Power Company are the most favorable rates that I know of.

CROSS EXAMINATION.

Mr. D. W. Robinson: Mr. Walters please note that I move to strike out the testimony of the witness on the ground that it is not in reply, is largely hearsay, and is not the best evidence. I make this cross-examination subject to this objection, and am not waiving it.

(323) I have not gone and inspected the lines of the New Orleans Public Service Company. The information I am testifying to is what I learned upon inquiry. I have never inspected the lines of the Arkansas Light and Power Company or the Mississippi Power and Light Company, but I know the rates as given in the rate book and by corroborating it with the officials of the company. I have done that by telegraph. I am familiar with the Mississippi Power and Light Company. I have no figures which would enable me to compare the population density of the territory served by the Mississippi Power and Light Company or of the territory served by the Arkansas Light and Power Company with that of the territory served by the Duke Power Company. Customer density is not necessarily a material matter to determine in comparing rates. I am merely comparing rates, not conditions.

Mr. W. S. O'B. Robinson: I would like to state that this testimony is offered only in reply to Mr. Rose, and in reply to Mr. Rose's comparison of those rates with the rates of the Duke Power Company. If Mr. Rose did not intend to make a comparison of those rates with the rates of the Duke Power Company, and that part of his testimony is not to be considered in the case, I don't insist on this.

Customer density is a factor in determining rural rates. The reason there are not rural lines all over our territory is that the customer density is too small. The customer density in this territory is very small. The rates of the Potomac Electric Power Company do not compare with the Duke rates. They have an entirely different situation. Not only is their customer density greater than that of the Duke Power Company but also the Potomac Electric Power Company has a very favorable condition in that it serves the City of Washington with a highly concentrated load, whereas, the load of the Duke Power Company is spread over a very large territory. The rural rate of the Potomac Electric Power Company rate starts at 80¢ for 10 kilowatt hours. If the minimum bill of the Potomac Electric Company is 50 kilowatt hours then the Potomac rate on that basis would start with $1.95 for each customer as against Duke's 80¢. The

(324) Duke Power Company rate does not start about twice as high as the Potomac Electric Power Company. You can't compare the rates on that basis. The rate speaks for itself. It is 80¢ for 10 kilowatt hours. That is merely a minimum bill of 80¢ for which 10 kilowatt hours are included. If a customer uses as much as 10 kilowatt hours his price would be 8¢ per kilowatt hour but that is not the rate.

I am rate engineer for the Duke Power Company. We are always working on studies of the rates in effect but at the present time I have no changes to recommend, and I have no specific changes in mind to be made in the rates of the Duke Power Company in the future. I am a specialist in rate matters and have done a great deal of this kind of work.

RE-DIRECT EXAMINATION.

The Duke Power Company rate of 80¢ for the first 10 kilowatt hours is the minimum bill. I do not know what the minimum bill of the Potomac Electric Power Company is. There is no service charge. It is my job with the Duke Power Company to continuously keep up with the rates daily and the conditions in the territory served by the company, and as changed conditions come about to make such changes or adjustments in rates or rate schedules as can be made to render the best serviee to the customers at the cheapest possible price.

STATEMENT OF EVIDENCE.

PART III.

PLAINTIFFS' EXHIBIT #6.

Nov. 10, 1933.

Mr. L. Jeffords, Superintendent,
C. & W. C. Railroad,
Augusta, Ga.

Dear Sir:

The County of Greenwood plans to build a dam

(325) across Saluda River about 15 miles below the C. & W. C. railroad bridge across Saluda River between Greenwood and Laurens.

We have not definitely decided whether or not to develop a 60 ft. head or a 65 ft. head plant. Should we decide upon a 60 ft. head plant your railroad bridge would have to be raised 4.1 ft. in order to give a clearance beneath the bottom cord of the main span of 4 ft. The bottom of your bottom cord is at an elevation of 439.87. The top of the rail on the main span of the bridge is 445.07. In other words should we develop a 60 ft. head plant the water level beneath your bridge would be 0.13 above the bottom of your bottom cord.

We prefer to develop 65 ft. at this time unless the matter of raising several bridges is too expensive. Should we develop the 65 ft. head the bridge would have to be raised 9.1 ft. to obtain the same 4 ft. clearance.

Would you be so kind as to give us approximate estimates of cost covering the two cases, that is the 60 ft. head proposition and the 65 ft. head proposition. We are very anxious to get our preliminary estimate of cost covering this proposition to Washington next week. We would like to ask that you, if possible, give us some approximate figures that we might use in our estimate which we are preparing. Of course we would appreciate a pretty close estimate of cost covering the situation but we thought that this would take you more than a week to prepare.

If it is not too much trouble it would be greatly appreciated if you would visit us here at Greenwood and discuss the matter with us. We understand that any estimate that you might give us will not in any way be binding at the present time.

With kind personal regards, I remain,

Yours very truly,

(S) D. T. DUNCAN,
Engineer in Charge.

(326) **PLAINTIFFS' EXHIBIT #7.**

ATLANTIC COAST LINE RAILROAD COMPANY

Office of Chief Engineer

Wilmington, N. C.

J. E. Willoughby,
Chief Engineer. November 14, 1933 WG

Mr. D. T. Duncan, Engineer in Charge,
Finance Board for Greenwood County,
Greenwood, S. C.

Dear Sir:

Referring to your letter of the 10 instant to Mr. L. S. Jeffords, Superintendent, Charleston & Western Carolina Railroad.

I enclose you estimate of cost of raising the bridge which carries the Charleston & Western Carolina Railroad over the Saluda river and the approach trestles by 4.1 feet and also by 9.1 feet.

Yours truly,

J. E. WILLOUGHBY,
Chief Engineer.

enc.
Cy
Mr. Jeffords.

Copy.

PLAINTIFFS' EXHIBIT #8.

ESTIMATE—Cost to raise Saluda River Bridge, C. & W. C. railway, near Coronaco, South Carolina, account proposed construction of dam by Greenwood County.

A. 4.1 ft raise

Raise steel bridge—254 ft long	$ 400
Blocking	2250
Steel grillages 45,000# at 5¢	360

(327) Concrete material—30 cu. yds. at $12.00		
Labor	1500	$ 4510
Raise wood trestle—825 ft. long		
Blocking and frame bents 115,000 B.M.F. at $25	$ 2875	
Hardware	200	
Labor raising and framing	2300	5375
Raise grade		
Fill 19,000 cu. yds. at 40¢	$ 7600	
Track work 2400 ft. at $1.00	2400	10,000
Engineering and Incidentals		1,985
		$ 21,870
B. 9.1 ft. raise		
Raise steel bridge 254 ft. long		
Blocking	$ 500	
Steel grillages, 90,000 at 5¢	4,500	
Foundation piles 4800 ft. at 50¢	2,400	
Rein. conc. pier jackets 975 cy at $25	23,125	
Labor raising spans	2,500	$ 33,025
Raise wood trestle 825 ft. long		
Blocking & frame bents, 200,000 BMF at $25	5,000	
Labor raising and framing	4,000	
Hardware	500	9,500
Raise grade		
Fill 62,000 c.y. at 40¢	24,800	
Track work 2900 ft. at $2.50	7,250	32,050
Engineering and Incidentals		7,355
		$ 80,930

Office of Engineer of Metal Structures,
Wilmington, N. C., Nov. 14, 1933.

Copy.

(328) **PLAINTIFFS' EXHIBIT #9.**

ATLANTIC COAST LINE RAILROAD COMPANY

Office of Chief Engineer

Wilmington, N. C.

J. E. Willoughby,
Chief Engineer

Feb. 1, 1935 WG
at Richmond

Mr. D. T. Duncan, Chief Engineer,
Finance Board of Greenwood County,
Greenwood, S. C.

Dear Sir:

I enclose you detail of the estimate aggregating $260,000 for permanent structure to carry the C&WC over the Saluda river at an elevation of 9′ above the present.

I will tomorrow send you from Wilmington the estimate of cost which you asked for raising this trestle 4′ and providing for

(1) a permanent structure of steel and concrete;

(2) a creosoted ballast deck trestle.

In sending you these estimates it is not to be understood that this engineering information which I furnish is in the nature of an authority to Greenwood County to proceed with the work and it is not to be understood as an approval of any engineering plans which you may have in contemplation.

The authority for raising the C&WC grade will, of course, be passed on by the Board of Directors and I, as chief engineer of the C&WC, would want to have opportunity to analyze the plans which you have for the construction which would result in the raising of the water at the C&WC crossing.

(329) I am sending a copy of this letter to Messrs. Johnson & Roberts, Engineers at Marion, S. C.

Yours truly,

J. E. WILLOUGHBY,
Chief Engineer.

CY Johnson & Roberts

COPY

(The estimate herein referred to is identical with that included as plaintiffs' exhibit #10.)

PLAINTIFFS' EXHIBIT #10.

CHARLESTON AND WESTERN CAROLINA RAILWAY

ESTIMATED COST TO RAISE GRADE AT SALUDA RIVER CROSSING 9.0 FT., PAVE SLOPES WITH RIPRAP, REPLACE WOODEN TRESTLE WITH STEEL VIADUCT, AND REINFORCE THE EXISTING CHANNEL SPAN PIERS. ACCOUNT PROPOSED DAM CONSTRUCTION BY GREENWOOD COUNTY.

Approach Fills

Fill 90,000 C. Y. @ 40	$36,000	
Raise Track, 25,000 ft. raised 1 ft. @ .20	5,000	
Cross ties replaced 50% 900 @ 1.25	1,125	
Track fastenings, etc.	350	
Ballast 1,600 C. Y. @ 1.50	2,400	
Tee walls for fills 300 C. Y. @ .15	4,500	
Paving for filfs in water 5,200 C. Y @ 6.00	31,000	$ 80,375

Steel Viaduct Replacing Wood Trestle

14—60' D. P. G. Spans on Plain Concrete Piers—Pile Foundation:	
Excavation 980 C. Y. @ 1.00	980

(330) Foundation piles 24,640 ft. @ .50	12,320	
Concrete 1,890 C. Y. @ 20.00	37,800	
Steel spans in place 826,000 lbs. @ 5½	45,430	
Creosoted deck 62 M.B.M. ft. @ 90.00	5,580	
Painting	2,065	
Raise present track 3'-6"	4,000	
Additional piles and caps	2,920	111,095
Raising Two Existing Steel Truss Spans—9 ft.		
Blocking	500	
Steel grillages 90,000 lbs. @ 5¢	4,500	
Foundation piles 4,800 ft. @ .50	2,400	
Reinf. conc. pier jackets 925 c.y. @ 25.00	23,125	
Labor raising spans	3,000	
5½ ft. runoff at each end of truss spans	4,500	38,025
Miscellaneous		
Delays to trains 500 hrs. @ 5.00	2,500	
R. R. Supervision	5,000	
Telegraph service	2,500	10,000
Engineering and Contingencies		20,505
		$ 260,000

A.O.L.R.R.
Office of Engineer Metal Structures
Wilmington, N. C. Jan. 9, 1935 ggt.

PLAINTIFFS' EXHIBIT #13.

STATEMENT OF TRANSMISSION & DISTRIBUTION LINES IN GREENWOOD, LAURENS AND NEWBERRY COUNTIES—DUKE POWER SYSTEM AS OF DECEMBER 31, 1934.

	Greenwood Cty. Miles of		Laurens Cty. Miles of		Newberry Cty. Miles of		Total Miles of	
	Struct.	Cir.	Struct.	Cir.	Struct.	Cir.	Struct.	Cir.
TRANSMISSION LINES								
Duke	47.55	76.35	42.99	59.56	90.87	172.65	181.41	308.56
S. P. U.			24.85	25.15			24.85	25.15
Total	47.55	76.35	67.84	84.71	90.87	172.65	206.26	333.71
DISTRIBUTION LINES								
Duke	.82				1.05		1.87	
S. P. U. Urban & Suburban	3.34		29.17		8.45		40.96	
S. P. U. Rural	7.48		119.93		1.35		128.76	
Total	11.64		149.10		10.85		171.59	
Grand Total	59.19		216.94		101.72		377.85	

(332) **PLAINTIFFS' EXHIBIT #14.**

REDUCTIONS IN RATES MADE BY PLAINTIFFS SINCE DECEMBER 1, 1928.

December 1, 1928	$ 519,400
November 1, 1932	1,515,500
May 1, 1933	418,100
September 1, 1934	1,335,000
March 1, 1935	118,500
Total	$3,906,500

PLAINTIFFS' EXHIBIT #15.

DUKE POWER COMPANY

SCHEDULE NO. 1-A

Primary Power for Textile and Grain Mills Contracting for 100 Kilowatts and over.

Kilowatt Hours Per month	Per Kilowatt Hour
First 50,000	1.225 cents
Next 100,000	1.20 cents
Next 100,000	1.15 cents
Next 100,000	1.00 cent
Next 150,000	.85 cent
All over 500,000	.775 cent

This schedule is subject to the following classifications and conditions:

CLASS 1:

Consumers contracting to take from the Power Company all power required for the operation of their plants or some definitely segregated portion thereof will be allowed the discounts hereinafter stated; and except in special cases where a higher minimum charge may be agreed upon between the Company and the Consumer, will be charged a minimum amount of $200.00 a month.

(333) CLASS 2:

Consumers supplying a part of their power requirements from their own power plants and obtaining the remainder from the Power Company shall have the option of contracting:

(A) For the payment of a monthly minimum charge of $2.00 per kilowatt of the capacity of their own plants, but in no case shall said monthly minimum charge be less than $200.00; and such Consumers will be allowed the discounts hereinafter stated for power taken from the Power Company; or

(B) For the payment of a monthly minimum charge of $2.00 per kilowatt of the Consumer's maximum demand, as hereinafter defined, but in no case less than an amount to be agreed upon between the Consumer and the Company, which amount shall in no event be less than $200.00. No discounts will be allowed Consumers in this class; but if in any month their minimum charge exceeds the value of the kilowatt hours taken in that month, computed at the above scale of rates, the amount of such excess when paid shall be credited by the Power Company on any bill or bills thereafter rendered the Consumer for power sold and delivered to it within 12 months following the month for which such excess shall accrue, provided that such credit shall be applied only on so much of any such bill as is in excess of the minimum charge applicable to the month for which such bill is rendered.

MAXIMUM DEMAND:

The maximum demand to be used and applied by the Power Company in computing each monthly bill of consumers under this schedule shall be the maximum number of kilowatts taken by the Consumer for a continuous period of thirty (30) minutes within the preceding three (3) months, including the month for which the bill is rendered. The maximum demand will be established by demand meters to be installed by the Power Company, and pending their installation may be estimated. The term month as used in this paragraph means the period intervening between meter readings for purposes of monthly billing, such readings being taken once a month.

(334) DISCOUNTS:

Discounts will be allowed consumers under Class 1 and Class 2-A each month in which such consumer makes use of its maximum demand for over 240 hours, as follows: 10% of the kilowatt hour charges for use of the maximum demand over 240 and not exceeding 300 hours; 20% over 300 and not exceeding 360 hours; and 40% over 360 hours.

DUKE POWER COMPANY

SCHEDULE NO. 10

Rates for primary power to consumers whose principal business is the resale and distribution of electric energy, and to municipalities for resale and/or for municipal power purposes, contracting for 100 kilowatts and over.

Demand Charge:

Kilowatts Billing Demand		Per Kilowatt
First	300	$ 1.15
Next	700	$ 1.00
All over	1,000	$ .90

PLUS AN

Energy Charge:

Kilowatt Hours Per Month		Per Kilowatt Hour
First	50,000	.82 cent
Next	150,000	.80 cent
Next	200,000	.75 cent
All over	400,000	.70 cent

DETERMINATION OF DEMAND

CLASS 1:

For Consumers contracting to take their entire power requirements from the Power Company, the demand for billing purposes each month shall be the maximum integrated thirty-minute demand during said month, but not less than 100 kilowatts.

(335) CLASS 2:

For Consumers who do not contract to take their entire power requirements from the Power Company, the demand for billing purposes each month shall be the maximum integrated thirty-minute demand during said month, but not less than 75 per cent of the highest integrated 30-minute demand in the previous twelve months, including the month for which the bill is rendered, nor less than 75 per cent of the contract demand, nor less than 100 kilowatts.

MINIMUM MONTHLY CHARGE

The minimum monthly charge shall be the demand charge.

PLAINTIFFS' EXHIBIT #16.

SOUTHERN PUBLIC UTILITIES COMPANY

Electricity No. 1
Second Revised Leaf No. 4
Superseding First Revised Leaf No. 4

SCHEDULE NO. 1

RESIDENTIAL ELECTRIC SERVICE

Available only for lighting, cooking, heating, refrigeration and incidental power which is entirely of a residential nature.

The Company will, at its option, furnish either approximately 110 volt, 2 wire, or 110/220 volt, 3 wire, 60 cycle, single phase meter service.

Motors under 2 horse-power, 110 volt, may be installed and the total consumption billed under this Schedule, but the Company does not guarantee the voltage regulation of such mixed installations.

Motors frequently started, or arranged for automatic control, must be of a type to take the minimum starting

(336) current and must be equipped with controlling devices approved by the Company.

RATE

80 cents for the first 10 KWH, or less, used per month.
6½ cents per KWH for the next 20 KWH used per month.
3 cents per KWH for the next 100 KWH used per month.
2½ cents per KWH for all over 130 KWH used per month.

TERMS OF PAYMENT.

The above are net rates and apply only in case a bill for service furnished under this Schedule is paid at the office of the Company on or before the tenth day after its date. If not so paid, the gross rates, which are the above rates plus 5 per cent, then apply.

TERM OF CONTRACT.

The original term of this Contract shall be one year, and thereafter it shall be taken as a yearly contract and may be terminated at the end of any year by either party on thirty days' written notice.

SOUTHERN PUBLIC UTILITIES COMPANY

Electricity No. 1
First Revised Leaf No. 4-B
Superseding Original Leaf No. 4-B
And changing types of service.

SCHEDULE NO. 1-W

WATER HEATING SERVICE

The company will furnish approximately 220 volt, single phase, 60 cycle, metered service for water heating purposes only, provided the water heaters are of the storage type, with at least ten gallons of storage capacity for each one kilowatt of heating capacity and further

(337) provided the hours of use are under the control of the company and may be limited to fifteen hours out of each twenty-four.

RATE

1½ cents per KWH for the first 200 KWH used each month.
1 cent per KWH for all over 200 KWH used each each.

MINIMUM

The minimum monthly bill shall be $1.00.

TERMS OF PAYMENT

The above are net rates and apply only in case a bill for service furnished under this Schedule is paid at the office of the Company on or before the tenth day after its date. If not so paid, the gross rates, which are the above rates plus 5 per cent, then apply.

TERM OF CONTRACT

The original term of this contract shall be one year and thereafter it shall be taken as a yearly contract and may be terminated at the end of any year by either party on thirty days' written notice.

It is understood that current furnished under this rate is solely for water heating purposes.

PLAINTIFFS' EXHIBIT #17.

(338)

DUKE POWER COMPANY

(Including Southern Public Utilities Company)

POWER SOLD AND DELIVERED IN GREENWOOD, LAURENS, AND NEWBERRY COUNTIES, SOUTH CAROLINA, (EXCLUDING INTER-COMPANY SALES) FOR THE CALENDAR YEAR 1934.

	Date of Beginning of Service	No. of Customers	Sold By	Kilowatt Hours. Delivered
Greenwood County				
Town of Greenwood	4/17/97	1	Duke	4,119,600
Mathews Cotton Mill—Greenwood	10/18/13	1	Duke	908,460
Grenco Oil Company—Greenwood	1/1/20	1	Duke	668,600
Iva B. Stockman—Greenwood	6/1/15	1	Duke	43,660
Town of Ninety-Six	7/4/17	1	Duke	589,580
Piedmont & Northern Rwy. Co.—Downs	3/1/15	1	Duke	1,631,400
Misc. Consumers, consisting of Residential Consumers, Churches, Stores, etc.		118	S.P.U.	69,799
Total Greenwood County		124		8,031,099
Laurens County				
Joanna Cotton Mills—Goldville	2/1/25	1	Duke	10,260,480
Laurens Cotton Mills—Laurens	8/1/27	1	Duke	5,515,000
Watts Mills—Laurens	5/1/27	1	Duke	2,929,800
Town of Clinton	2/1/25	1	Duke	1,655,600
Clinton Cot. Mills—Clinton, S. C.*	8/1/25	1	Duke	2,090,400
Lydia Cot. Mills—Clinton, S. C.*	3/1/25	1	Duke	1,239,360
Comm. Public Works—Laurens, S. C.	1932**	1	S.P.U.	1,305,300

(339) Kattermann & Mitchell	"	1	S.P.U.	212,520
Laurens Glass Works	"	1	S.P.U.	1,264,420
Carolina-Georgia Service Company	"	1	S.P.U.	167,026
City Ice Company—Laurens, S. C.	"	1	S.P.U.	173,700
Gins		20	S.P.U.	253,602
Misc. Consumers consisting of Residential Consumers, Churches, Stores, etc.		856	S.P.U.	365,620
Total Laurens County		887		27,432,828
Newberry County				
Newberry Cotton Mills—Newberry	8/1/11	1	Duke	2,585,520
Oakland Cotton Mills—Newberry	1/8/12	1	Duke	4,318,920
Mollohon Manufacturing Co.—Newberry	1/7/12	1	Duke	6,867,000
Comm. Public Works—Newberry	12/1/14	1	Duke	1,974,740
Farmers Oil Mill—Newberry	9/18/11	1	Duke	889,700
Town of Prosperity	11/12/20	1	Duke	176,983
Aragon-Baldwin Cot. Mills—Whitmire	4/20/12	1	Duke	9,600,000
Gins		1	S.P.U.	11,200
Ice Plants		1	S.P.U.	102,360
Misc. Consumers consisting of Residential Consumers, Churches, Stores, etc.		170	S.P.U.	152,488
Total Newberry County		179		26,678,911
GRAND TOTAL		1,190		62,142,839

NOTE—Power is sold wholesale to the following municipalities viz: Greenwood, Ninety-Six, Clinton, Laurens, Newberry, Prosperity and plaintiffs have no record of the number of ultimate customers to whom such power is retailed by these municipalities.

*—Discontinued May, 1934.

**—Customers of National Utilities Company prior to 1932.

(340) **PLAINTIFFS' EXHIBIT #18.**

STATEMENT SHOWING CUSTOMERS NOW SERVED BY DUKE POWER SYSTEM IN GREENWOOD, LAURENS, AND NEWBERRY COUNTIES, SOUTH CAROLINA, WHO ARE LISTED IN THE APPLICATION OF GREENWOOD COUNTY FILED WITH THE FEDERAL POWER COMMISSION, SEPTEMBER 13, 1934, AS CUSTOMERS WITH WHOM THE COUNTY NOW HOLDS CONTRACTS FOR THE SALE OF PRIMARY POWER TO BE PRODUCED BY THE BUZZARDS ROOST PLANT, OR AS PROSPECTIVE CUSTOMERS FOR THE SALE OF PRIMARY POWER FROM SAID PLANT. ALSO SHOWING ACTUAL SALES IN K.W.HRS. BY DUKE POWER SYSTEM TO SAID CUSTOMERS IN 1934, AND GREENWOOD COUNTY'S ESTIMATE OF ANNUAL POWER CONSUMPTION OF SUCH CUSTOMERS.

CONSUMERS WITH WHOM GREENWOOD COUNTY HOLDS CONTRACTS	Sales by Duke Power System For Year 1934 (In K.W Hrs.)	Greenwood County's Estimate of Annual Power Consumption (In K.W. Hrs.)
Primary Power		
City of Greenwood	4,119,600	6,000,000
Grenco Oil Mill	668,600	750,000
Town of Ninety-Six	589,580	750,000
City of Newberry	1,974,740	3,000,000
Farmers Oil Mill & Ice Plant	889,700	1,000,000
City of Laurens	1,305,300	2,000,000
Laurens Glass Works	1,264,420	1,200,000
Rural Electrification		500,000
Misc. Consumers consisting of Residential Consumers, Churches, Stores, etc.	1,295,795	
	12,107,735	15,200,000

(341) Secondary Power		
Grendel Cotton Mills		3,000,000
Total Primary & Secondary Contracts		18,200,000
PROSPECTIVE CUSTOMERS IN THE BUZZARDS ROOST AREA		
Primary Power		
City of Clinton	1,655,600	1,200,000
Cotton Mills at Goldville	10,260,480	15,000,000
Cotton Mills at Newberry	13,771,440	20,000,000
City of Prosperity	176,983	500,000
Cotton Mills at Greenwood	952,120	17,000,000
City of Abbeville		1,200,000
City of Edgefield		1,200,000
Cotton Mills at Laurens	8,657,320	15,000,000
Rural Electric Customers		1,000,000
	35,473,943	72,100,000
Secondary Power		
Cotton Mills at Clinton		17,000,000
Cotton Mill at Ninety-Six		9,000,000
Cotton Mills at Abbeville		3,000,000
Cotton Mill at Edgefield		3,000,000
		32,000,000
Total prospective Customers—Primary & Secondary		104,100,000
CUSTOMERS OF DUKE POWER SYSTEM WHICH ARE NOT SHOWN IN THE COUNTY'S APPLICATION AS HAVING MADE CONTRACTS OR AS PROSPECTIVE CUSTOMERS OF THE COUNTY.		
Piedmont & Northern Railway	1,631,400	
Mills at Clinton (Discontinued May 1934)	3,329,760	
Aragon-Baldwin C. M.—Whitmire	9,600,000	
	14,561,160	
Grand totals	62,142,838	122,300,000

PLAINTIFFS' EXHIBIT #19.

(342) DUKE POWER SYSTEM—SOUTH CAROLINA

TAXES PAID FOR THE CALENDAR YEAR 1934.

	Duke Power Co.	Sou. Pub. Util. Co.	Total
Annual Statement	20.00	10.00	20.00
3 Mills License Tax on Gross Receipts	15,925.31	9,540.97	25,466.28
Property License Tax	128,198.91	33,392.48	161,591.39
S. C. Railroad Commission	6,914.18	4,291.87	11,206.05
Electric Utilities Division	16,290.09	8,438.31	24,728.40
Electric Power Tax	388,138.07	42,260.71	430,398.78
Chain Store Tax		225.00	225.00
Municipal License Taxes	879.75	7,294.00	8,173.75
Property Taxes	471,055.27	235,085.42	706,140.69
State Income Tax	88,834.90	21,510.69	110,345.59
	1,116,256.48	362,049.45	1,478,305.93
Federal Excise Taxes		42,468.02	42,468.02

	Duke Power Co.	Sou. Pub. Util. Co.			
Federal Income Tax	380,259.09	126,152.49			
New Jersey Corporation Tax	8,814.98				
Maine Franchise Tax		650.00			
Tax on Bonds and Bond Interest	3,545.21	3,590.18			
Federal Excise Taxes	1,062.49	281.08			
Capital Stock Tax	50,000.00	20,000.00			
Documentary Stamp Taxes	92.40				
	443,774.17	150,673.75			
Allocated on Basis of Gross Receipts in South Carolina	32.05%	25.13%	142,229.62	37,864.31	180,093.93
Gross Receipts in South Carolina			1,258,486.10	442,381.78	1,700,867.88
Ratio Taxes Gross Receipts			4,572,649.50	3,315,150.21	7,887,799.71
			27.52%	13.34%	
Inter-Company Sales Eliminated			*742,332.37*	*47,957.08*	*790,289.45*
					7,097,510.26
Ratio of combined taxes to combined gross receipts					23.96%

(344) **PLAINTIFFS' EXHIBIT #20.**

DUKE POWER SYSTEM

TAXES—GREENWOOD COUNTY

	Duke Power Company	Southern Public Utilities Co., including Savannah River Power Co.	Total
1929	$3,243.55	$251.21	$3,494.76
1930	3,456.87	280.06	3,736.93
1931	4,315.00	451.86	4,766.86
1932	5,032.65	440.96	5,473.61
1933	4,358.40	370.58	4,728.98
1934	4,437.72	372.55	4,810.27

PLAINTIFFS' EXHIBIT #21.

COPY

AN ORDINANCE GRANTING PERMISSION UNTO SOUTHERN POWER COMPANY TO CONSTRUCT AND MAINTAIN ITS LINES FOR THE TRANSMISSION OF ELECTRICITY ALONG, OVER, AND UNDER THE HIGHWAYS OF THE TOWN OF NEWBERRY, SOUTH CAROLINA, AND TO CONSTRUCT AND CARRY ON WITHIN SAID TOWN OF NEWBERRY THE BUSINESS AUTHORIZED BY AND UNDER THE TERMS OF THE CHARTER OF SAID SOUTHERN POWER COMPANY.

Be it ORDAINED by the Mayor and Aldermen of the town of Newberry, South Carolina, in Council assembled:

SECTION 1. That assent and permission be, and the same is hereby, given and granted unto SOUTHERN POWER COMPANY, its successors, lessees, and assigns,

(345) to lay, plant, extend, construct, build, erect, maintain, repair, and remove its lines, poles, wires, appliances, conductors, fixtures, and other appurtenances for the conducting, conveying, and the transmission of power by electricity upon, along, over, and under any and all highways, roads, streets, avenues, sidewalks, alleys, lanes, bridges, and other public places within and near the Town of Newberry, and to do all necessary acts for the purposes; and assent and permission is hereby given and granted unto said SOUTHERN POWER COMPANY to conduct, carry on, transact, and do within and near said Town of Newberry any and all business, and exercise all rights and privileges which the said SOUTHERN POWER COMPANY, under and by the terms of its charter, or otherwise, is authorized, empowered, or permitted to conduct, carry on, exercise, do, or transact, including among other powers, privileges, and rights, the right, power and privilege to use, lease, sell, convey, and transmit power by electricity for manufacturing, lighting, heating, motive power, or other purpose or purposes.

SECTION 5. This Ordinance is passed and the foregoing rights, powers and privileges are hereby granted and given unto Southern Power Company, its successors, lessees, and assigns, upon the distinct understanding and condition that said Southern Power Company, its successors, lessees, and assigns, shall not sell or furnish electricity for lighting purposes within the Town of Newberry, either to consumers direct, or to any third person, firm, or corporation for the purposes of resale or distribution, except that Southern Power Company may sell and furnish electricity for lighting purposes to the Commissioners of Public Works of the Town of Newberry, for the use of the said town, PROVIDED, however, that Consumers of power in amounts of One Hundred (100) horsepower, or more, may use such portion thereof as is necessary for lighting its or their manufacturing plants and premises.

SECTION 6. This ordinance and the rights and privileges herein granted shall remain and continue in effect for the term of sixty (60) years from the date hereof.

DONE AND RATIFIED IN TOWN COUNCIL,

(346) UNDER THE CORPORATE SEAL OF THE TOWN OF NEWBERRY, ON THE 8 DAY OF MARCH, A. D. 1911.

(S) J. J. LANGFORD,
Mayor.

Attest:

(S) J. R. SENNY,
Clerk & Treasurer of the
Town of Newberry, S. C.

PLAINTIFFS' EXHIBIT #22.

AN ORDINANCE

Granting the Reedy River Power Co., the right to do business in the City of Laurens. Be it ordained by the City Council of the City of Laurens:

Section One. That Reedy River Power Company is hereby granted the right to carry on and conduct the business authorized by its charter within the corporate limits of the City of Laurens, and may sell, lease and supply electric power to individuals, firms or corporations, provided, that this ordinance shall not be construed as an exemption to said corporation from any taxes or licenses, which may be lawfully imposed.

Section Four. The rights and franchise granted to said Corporation are hereby vested in it, its successors and assigns perpetually.

Done and ratified by the City Council of Laurens in Council assembled this, the twenty-seventh day of June 1906.

W. R. RICHEY, Mayor.

(L. S.)

L. G. BALLE, CITY CLERK.

(347) **PLAINTIFFS' EXHIBIT 23.**

COPY

State of South Carolina,
County of Laurens,
City of Laurens.

AN ORDINANCE RELATING TO THE STREETS AND HIGHWAYS OF THE CITY AND THE BUSINESS OF THE SULLIVAN POWER COMPANY.

Be it ordained by the City Council of the City of Laurens, in council assembled, and by the authority of the same, that from and after the passage and adoption of this ordinance, Sullivan Power Company, a corporation created and existing under the laws of the State of South Carolina be, and the same is hereby given full power and authority to carry on and conduct its business, authorized and provided for in its charter, within the corporate limits of the City of Laurens:

Done, approved, ratified and adopted by the said Council of the City of Laurens in session assembled and by the authority of the same and the seal of the City of Laurens hereto affixed this the 11th day of Mch A. D. 1913.

(s) C. M. BOGG,
Mayor of the City of Laurens.

Attest:

J. A. ROLAND,
Clerk of the City Council
of the City of Laurens.

This is a true copy of the original ordinance. 5 January 1928.

W. J. SIMPSON,
City Clerk.

(348) PLAINTIFFS' EXHIBIT #25.

SEABOARD AIR LINE RAILWAY

PRELIMINARY ESTIMATE

Proposed Saluda River Valley Crossing, South Carolina (including Cove or Cane Creek) therewith, involving a new railroad location, and including track, bridges, etc., required on account of water proposed to be impounded and backed up on the property and tracks of the Seaboard Air Line Railway. Distance affected is approximately 1.8 miles of railroad. Estimate is based on embankment slope of 2½ horizontal to one vertical. Approximate location is between Seaboard Air Line Railway mile post 413.8 to 415.6 northeast of Greenwood, S. C. (This study is based on elevation for top of proposed gates 440 at dam site).

Graduation work	$ 97,500.00
Jetting the fills	4,650.00
Riprap stone for protection, including delivery and placing	55,610.00
Culvert drainage pipes	3,600.00
Right of way	1,125.00
Clearing and grubbing	2,000.00
Making required railroad connections	1,000.00
Engineering and contingencies on above	15,470.00
Track laying and surfacing	32,054.00
Steel girder bridge in place (Saluda River & Cove Creek—1000')	128,325.00
Telegraph wire work and reconstruction	4,000.00
Total Preliminary Estimate (excluding interest and equipment charges)	$345,334.00

Notes:

A—To the above must be added, as a cost to the railway, the additional maintenance, etc., required over a period of years.

(349) B—The embankment slopes are figured on rate of 2½ to 1. If further facts develop a flatter slope is required, the same must be added.

C—The width of bridge openings have been taken at approximately 1000 feet. If further study requires larger openings, it must be added to above preliminary figure.

Office of Chief Engineer,
Seaboard Air Line Railway,
Norfolk, Va., June 8, 1935.
C. E. File 33630.

PLAINTIFFS' EXHIBIT #26.

COPY

FINANCE BOARD FOR GREENWOOD COUNTY

Greenwood, S. C.
November 10, 1933.

Chief Engineer
Seaboard Air Line Railroad Co.,
Norfolk, Va.

Dear Sir:

The county of Greenwood, S. C., proposes to construct a hydro-electric plant and lake on Saluda River, about 10 miles below your railroad bridge across Saluda River on the line between Greenwood and Clinton.

We plan to develop either 60 or a 65 foot effective head hydro-electric plant. Should the 60 foot plant be built it will be necessary to raise the Seaboard Railway bridge at the main span 6.36 feet in order to gain a 4 foot clearance beneath the bottom cord. Should the 65 foot plant be developed it will be necessary to raise the bridge 11.36 feet.

We would greatly appreciate your giving us estimates of cost covering the two cases just mentioned. We would appreciate it very much if you could give us some approximate figures to use in our preliminary esti-

(350) mate which we hope to send off to Washington the latter part of next week.

Yours very truly,

(S) D. T. DUNCAN,
Engineer in Charge.

(412) **DEFENDANTS' EXHIBIT 27.**

COPY

Norfolk, Va.

November 17, 1933.

33630-B

Dr. D. T. Duncan,
Engineer in Charge,
Finance Board for Greenwood County,
Greenwood, S. C.

Dear Sir:

Replying to yours November 10th, the question you ask about the cost of raising our Saluda River bridge and adjoining track, to a height of either 6.36 feet or 11.36 feet involves a great deal of work. If we raise the bridge we would necessarily have to raise the track adjoining the bridge, and to give a close estimate of this would require a survey, which, of course, I have not had time to make. However, after studying our records, I have made an approximate estimate. To raise the track 6.36 feet would involve about 2700 lineal feet of track, and would cost about $60,100.00. To raise it 11.36 feet would involve about 3500 lineal feet of track and would cost about $81,700.00.

It is possible that a survey would enable me to somewhat lower these figures, but this is by no means certain. While the figures are approximate, I believe them to be reasonably close to the correct amount.

(351) Trusting this information will serve your purpose, I am,

Yours very truly,

(S) W. D. FAUCETTE,
Chief Engineer.

bc Mr. W. L. Stanley,
Mr. E. C. Bagwell.
With copy of Mr. Duncan's letter.

PLAINTIFFS' EXHIBIT #28.

COPY

FINANCE BOARD FOR GREENWOOD COUNTY

Greenwood, S. C.
February 12, 1934.

Mr. W. D. Faucette, Chief Engineer,
Seaboard Air Line Railway,
Norfolk, Va.

Dear Sir:

Please refer to your letter to me under date of November 17, 1933, file 33630-B.

Greenwood County made application to the Federal Power Commission at Washington for a license to construct a dam on the Saluda River for the purpose of building a municipal hydro-electric power plant. This dam would have developed a head of 60 feet requiring the raising of your bridge across the Saluda River 6.36 feet to give a clearance of 4 feet between the high water of the lake and the bottom of your bottom chord. We have just received a telegram from the Federal Power Commission at Washington questioning the propriety of building a dam with an effective head of 60 feet, and requesting that we develop the 75 foot head at this location in order not to destroy any of the natural resources of the country. They further request that we take the matter up with you and ask that you make an estimate for them of the cost of raising your bridge sufficiently and we find that the necessary raise for the same clearance of four feet will be 21.36 feet.

In looking over some of the contour maps which we

(352) have at hand, we find that this will affect not only your Saluda River crossing, but approximately 6000 linear feet of your track at the Cove Creek crossing appears to lie below our high water mark. Of course, I have no profile of your tracks and do not know the elevations of your track and trestle at Cove Creek which creek lies about one mile north of the Saluda River along your track. The fill at this point might be high enough to clear the high water although the location on my plan rests within our high water mark.

I would appreciate it very much if you would send me a profile of your track commencing 1/2 mile south of Saluda River and running two miles north from that point.

I would like your opinion on a few questions concerning the matter:

Would it be practical to raise this trestle much under traffic?

Could your trains be routed over the C. & W. C. to Laurens and back to Clinton on the CN&L?

The District Engineer's office at Charleston made an approximate estimate of raising this bridge the amount now in question about four years ago. I have wondered if they took the matter up with you and if you gave them the figures which they used. I believe they proposed relocating your line and the part of their estimate which I have, read as follows:

SAL one mile relocation	$ 50,000.00
Two bridges	215,000.00
Total	$265,000.00

This estimate by them no doubt was made up if they went into the matter that deeply, using common labor at 25 cents per hour and skilled labor at about 40 cents per hour while any estimates which we made at present will have to count on P. W. A. labor prices, that is 40 cents per hour for common labor and $1.00 per hour for skilled labor.

I have just noticed that some of the maps show the creek in question as Cove Creek while others have it as Cane Creek. I do not know which is correct.

It looks as if this project will go through either for

(353) the 60 foot head or the 75 foot head and your co-operation in the matter of preparing these estimates will be greatly appreciated both by us and the Federal Power Commission.

Yours very truly,

(S) DANIEL T. DUNCAN,
Engineer for Greenwood County.

PLAINTIFFS' EXHIBIT #29.

COPY

Norfolk, Va.
February 21, 1934.
33630-B

Mr. Daniel F. Duncan,
Engineer for Greenwood County,
Greenwood, South Carolina.

Dear Sir:

Replying to your letter of February 12th, with reference to hydro-electric plant on the Saluda River, and consequent raising of our track and bridge, if such were done. I understand from your letter that the project now is to build a dam sufficiently high to get a 75 foot head. If this is done and our track is retained on its present alignment, such a project would affect over two miles of line, and the maximum raise of the track will be around thirty five, forty or more feet. I am not able to give you even an approximate figure on this without making a survey, and in any event, I believe that very likely through a survey we can obtain an alignment on some higher grounds where the expense of making the change might be reduced.

I do not gather from your letter that this matter is yet definite, so that I hesitate to undertake a survey. If at any time you can give me some reasonable assurance that the project will be undertaken, I shall be glad to make a survey and determine the most economical method to fit such a project, the cost of such survey, of course, to be considered a part of the expense of making the change, and we reimbursed for same. Such willingness on our

(354) part to make a survey is not to be construed as favoring or approving such a plan. To alter mainline of railroad with all the facts involved and protected, is quite an undertaking.

Complying with your request, I am enclosing herewith a blueprint of part of our profile A-[illegible]-613, which shows profile of our track each side of Saluda River. This print should, of course, be treated as confidential information.

You of course understand that nothing in this letter can in any way bind the Receivers or the Seaboard to any action. Before anything can be undertaken, or any engagements made, the matter must be handled through our General Manager's office and due authority obtained.

Yours truly,

(S) W. D. FAUCETTE,
Chief Engineer.

bc Mr. E. C. Bagwell
Mr. J. L. Kirby

PLAINTIFFS' EXHIBIT #30.

COPY

DANIEL T. DUNCAN

Civil Engineer

Greenwood, S. C.
July 4, 1934.

Mr. W. D. Fausette, Chief Engineer,
Seaboard Air Line Railroad,
Norfolk, Va.

Dear Sir:

I wrote you under date of November 10, 1933, to which you replied on November 17, 1933, giving me an estimate of cost of raising your Saluda River bridge and adjoining track to the height of 6.36 feet above its present elevation. The P. W. A. has acted favorably on our project to date, and in checking over our estimate a little

(355) closer, it appears that we might have overlooked the fact that your track crosses a creek approximately 6000 feet north of Saluda River and that there is a possibility that your track at the crossing of this creek will have to be elevated also. I have no profile of your track, but by raising your Saluda River bridge 6.3 feet you would then have a clearance between your bottom chord and the lake level of four feet. With this information would you please be so kind as to apply it on your profile of the creek in question and the adjacent track and give me an approximate estimate of cost of raising the track at this creek crossing. I am assuming that you would need a four foot clearance between the water and the bottom chord of your trestle, if there is one, at this creek.

A reply by return mail will be greatly appreciated for we are to meet with the P. W. A. Power Review Board the first of next week and it is urgent that we have this information before that meeting.

Thanking you in advance for your consideration in this matter, I remain,

Yours very truly,

(S) D. T. DUNCAN,
Engineer in Charge.

PLAINTIFFS' EXHIBIT #31.

COPY

Norfolk, Va.
July 10, 1934.
33630-A

Mr. Daniel T. Duncan, Engineer in Charge,
(Chief Engineer—Finance Board—Greenwood County, S. C.)
Greenwood, South Carolina.

Dear Mr. Duncan:

I have your letter of July 4th, writing about proposed

(356) power project in the Saluda River-Cane Creek district on our line near Greenwood. Since your letter was received, you called on the 6th instant, and asked for a profile which I have given you, and which I think is sufficiently accurate to show you the general relationship of the Saluda River and Cane Creek.

As I explained to you that day, we are very glad to furnish you these profiles, and in doing so, it is not to be taken that we have gone into or concurred any plans affecting our railroad, or entered into any agreement regarding such plans. If our management should after all knowledge of the details and after receipt of application from proper authority, enter into any agreement, it would have to be protective of all of our facilities and property involved, free of any cost to the railway. The alteration or raising of the main line of a railroad is a major undertaking, and as I explained to you, any plan would have to be submitted in detail and approved by our management before we could go into the question of passing on any details affecting our railroad and property. You appreciate that this is an important part of our main line.

With kind regards, I am

Very truly yours,

(s) W. D. FAUCETTE,
Chief Engineer.

PLAINTIFFS' EXHIBIT #32.

COPY

Norfolk, Va.
January 22, 1935.

Mr. Daniel T. Duncan, Engineer in Charge,
(Chief Engineer—Finance Board—Greenwood County, S. C.)
Greenwood, South Carolina.

Dear Mr. Duncan:

Referring to our exchange of letters and conferences with respect to the Buzzards Roost power project:

(357) While we have previously indicated inability in the absence of definite plans and profiles to give an accurate estimate of the cost of revising the grade line of the Seaboard Air Line Railway, we wish now to clarify the situation as far as possible.

We have recently had Dr. Riddick of Raleigh, N. C., make a study of this project in respect to its effect on our railroad. Dr. Riddick called on you recently in Greenwood and discussed certain phases of the matter with you. Based on the information furnished us by Dr. Riddick, and what we believe to be the general plans of your project and the elevation of the water you expect to put where the Seaboard tracks now exist in the flooded area, we have made certain rough estimates and now wish to advise you that in our opinion, the cost of protecting the Seaboard's situation and providing a new line safe and satisfactory for our operations and maintenance, including the necessary bridges, waterways, etc., satisfactory to us, will be in excess of $325,000.

You appreciate of course that no surveys have been run by us and while actual surveys and correct plans and profiles may change this estimate, we believe this is accurate enough for the needs of the moment and I think you should have the best information available at this time.

I am sorry we could not give you an estimate sooner and I know you understand that estimating under such conditions is rather difficult.

Yours very truly,

(s) W. D. FAUCETTE,
Chief Engineer.

(358) **PLAINTIFFS' EXHIBIT #33.**

COPY

FINANCE BOARD FOR GREENWOOD COUNTY

Greenwood, S. C.
January 30, 1935.

Mr. W. D. Faucette, Chief Engineer,
Seaboard Air Line Railway,
Norfolk, Va.

Dear Sir:

I wish to acknowledge your letter of January 22, 1935.

The figure of $325,000 although it includes the Cane Creek crossing, is such an immense increase over your former approximate estimate of November 17, 1933 that we are forced to request some details to compare with our figures.

Would you be kind enough to split the figure of $325,000 (or more) between the Cane Creek crossing and the Saluda River crossing co ts?

We have a detailed estimate of cost covering the Cane Creek crossing which we made up.

In making up your figure of $325,000 what did you propose to do as to changes and alterations at both Cane Creek and Saluda River?

With kind personal regards, I am

Yours very truly,

(s) D. T. DUNCAN,
Engineer.

(359) **PLAINTIFFS' EXHIBIT #34.**

COPY

Norfolk, Va.
Feb. 5, 1935.
33630-A

Mr. Daniel T. Duncan, Engineer,
Finance Board for Greenwood County,
Greenwood, S. C.

Dear Mr. Duncan:

I have your letter of January 30, in connection with the rough estimate of the cost of protecting the Seaboard situation and providing a new railroad line, safe and satisfactory for our operations and maintenance, across the Saluda River valley and Cane (or Cove) Creek territory. As advised you in my letter of January 22, you appreciate that no detail surveys have been made by us and while final actual surveys and ultimate plans and profiles may change this estimate, the approximate figures I had reference to, based on information obtained from Dr. Riddick's report, making up the $325,000 or more, are quoted below:

Grading	$105,000.00
Riprap Stone	21,937.50
Labor placing riprap	32,500.00
Culvert pipe in place	3,680.00
Right of Way	1,125.00
Clearing and Grubbing	750.00
Making track connections at ends, wire service, etc.	2,000.00
Engineering and contingencies	16,699.50
Track laying and surfacing and ballast	31,372.00
Steel bridge work	128,325.00
Total, exclusive of interest during construction and hire equipment, etc.	$343,389.00

(360) Any higher labor rates required by the Public Works Administration or others, will increase the above figures.

With consideration of the local situation, and the height to which the final track elevation would have to be located, the proper and practicable way to treat this situation is to build an independent new line across the valley, which you are going to flood with your proposed project. As you can readily see, the length of such a line will be something over one and seven-tenths (1-7/10s) miles, and in which would have to be the necessary grading and fills, with adequate slopes, riprapping, steel bridge structures at Saluda River and Cane, or Cove, Creek, track, necessary ballasting, drainage, etc. It must be obvious to you that for a project of this size, the idea of raising the track and structures, etc., on the existing alignment, is hazardous, would be very expensive, delay and tie up traffic, for such a length of time, and bring about a situation, making it clear that it is impracticable to do it, and further, we cannot perpetuate wooden structures in water, and a new line is the proper way to handle this situation.

If you have used any figures given you in my letter of November 17, 1933, as the final cost for Seaboard protection, they are, of course, totally inadequate. You realize that the project as outlined requires the building of a new railroad line, covering not only the Saluda River crossing, but Cane (or Cove) Creek Valley crossing as well, and requires a new line all the way across, with proper bridges, riprapping, etc., satisfactory to us, as indicated above, and in this connection, I attract your attention to my letters to you of February 21, 1934 and July 10, 1934, that we had not reached any final understanding with you in regard to our requirements. For ready reference, I attach copies of these two letters.

The above is the best information I have available at this time, and I think sufficiently close for the general purposes of this letter, but for the reasons stated, the figures are subject to such changes as may be rendered necessary by a final survey and estimate. It is certain, howver, that the cost must, in the light of present information, necessarily be several times any such figure as $60,000 or $70,000.

(361) With kind regards, I am

Yours very truly,

(s) W. D. FAUCETTE,
Chief Engineer.

PLAINTIFFS' EXHIBIT #35.

P. W. 19325

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

PWA PRESS SECTION Release No. 989

IMMEDIATE RELEASE

Achievement in certain instances of the administration purpose of making electric energy more widely available at cheaper rates today lead to a clarification of the policy on power by the Public Works Administration.

Municipal or local publically owned power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes.

The statement of Administrator Ickes followed action by some privately owned utilities, which, on re-examination of their condition, found it possible to reduce rates to a point below those proposed by municipal project plants.

In all allotments made for municipal power plants by the Public Works Administration proposed rates have been well below existing private company rates. Consequently, the fact that the companies in some instances have met these proposed municipal rates has been deemed as showing progress toward one of the dams of this phase of the public works program.

(362) In the cases affected Public Works Administration policy will be so administered that municipal plant construction will not be deprived of the possibility of public works support until such time as the local Government feels assured the proposed rate reduction by the existing utility will be in effect on a reasonably permanent basis.

Since the public works program began financing electric plants, where they are socially desirable and where they will be self-liquidating, there has been reductions of rates by private utilities in different localities. The private utilities are becoming increasingly cognizant of the greater use of power resulting from lower rates.

Administrator Ickes said:

"PWA has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance municipal systems where reasonable security is offered and the project is socially desirable. They are deemed desirable where the loan can be amortized in a reasonable period while charging rates substantially lower than those of the existing utility.

"However, we make it a practice before approving the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self-liquidating. Several utility companies have accepted this opportunity. It is obvious that in such cases it is advantageous to the city and to PWA that the offer be accepted and the applications withdrawn. To make loans and grants to finance projects where the competitor offers rates which are lower than those possible by the city plant, would duplicate facilities without any social betterment and impose on the city a burden which it probably could not meet without resort to taxation.

"Furthermore, in the described situation Public Works will be free to use its funds to better advantage elsewhere. The action of the utility companies referred to supports the belief that domestic rates, in certain in-

(363) stances at least, are so high as to be disadvantageous to the company as well as unjust to the consumers. Experience shows that lower rates may produce larger profits particularly where promotional campaigns are conducted and the cost of electrical appliances is made reasonable.

"PWA will cooperate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect.

"State laws authorize municipal competition, hence it is PWA's position that the State has determined that such competition may be socially desirable. We believe it is for the municipal applicant to determine whether or not it desires to compete with privately owned utilities. It is our policy to consider such applications particularly where franchises are soon to expire, provided the project is self-liquidating at rates lower than those which the existing utility is willing to put into effect."

PLAINTIFFS' EXHIBIT #36.

The material parts of plaintiffs' exhibit #36 are as follows, to-wit:

Circular No. 1

THE PURPOSES, POLICIES, FUNCTIONING, AND ORGANIZATION OF THE EMERGENCY ADMINISTRATION—THE RULES PRESCRIBED BY THE PRESIDENT.

Article I

Circular No. 1 states the purposes of the National Industrial Recovery Act (title II, Public Works), and the purposes, policies, functioning, and organization of the Emergency Administration of Public Works, created by the President to effectuate title II.

It also states the rules and regulations prescribed by

(364) the President pursuant to section 209, as necessary to carry out the purposes of the title. These rules and regulations control all contracts let for construction of public works, financed under the act, whether Federal or non-Federal, and all loans and grants pursuant to title II. Any violation of any such rule or regulation is punishable by fine not to exceed $500 or imprisonment not to exceed 6 months, or both.

SECTION 1. Purposes of title II of the act.—(1) The Comprehensive program of public works. The act (sec. 201) provides that the Administrator, under the direction of the President, shall prepare a "comprehensive program of public works." The comprehensive program is to be related to the reconstruction legislation of which the Recovery Act is a part. The purpose underlying the entire scheme is, as stated in the declaration of policy of the Recovery Act, "to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

The formulation of a comprehensive plan of public works thus requires consideration of the functioning of the national economy as a whole. This in turn involves consideration of ascertained trends of population and industry, its centralization and decentralization, changes in the habits of the people caused by the substitution of the machine for human labor, the automobile, changes in railroad rates, in charges for electric current, the effect of massive projects like Boulder Dam, Tennessee Valley, and the St. Lawrence River improvement.

The formulation of the immediate comprehensive plan (which is necessary to provide employment quickly) involves the formulation of a long-range national plan to follow and be consistent with the immediate plan. To that end the President has directed the creation of a long-range planning board more particularly described later.

Obviously the purpose of the act to provide employment quickly cannot await the complete formulation of

(365) the comprehensive program. But it is possible to select projects which will be consistent with such program when formulated. The President and the Emergency Administration under his direction will not await complete formulation, but, "with a view to increasing employment quickly, while reasonably securing any loan made by the Administrator", will aid in the construction and financing of any public works project deemed worthy of inclusion (sec. 203).

The policies adopted by the Administrator, by the authority of the President, hereinafter set forth, are designed to provide an immediate program, Federal and local.

SECTION 4. President's power to make grants to public bodies.

The act throughout is permissive only. The President may exercise all, any, or none of the powers it invests in him.

The Administrator, with the approval of the President, has adopted policies to control the administration of the act.

ARTICLE II. POLICIES OF THE EMERGENCY ADMINISTRATION OF PUBLIC WORKS

SECTION 6. Tests for eligibility of projects.

The Administrator, the State advisory board and the State engineer (P. W. A.) will apply the following tests in determining the eligibility of each project submitted:

(1) The relation of the particular project to coordinated planning, and its social desirability.

Note: No project will be considered which is a mere makeshift to supply work. No non-Federal project will be considered which will require for its maintenance or operation an additional outlay by the Federal Government.

(366) The Administrator and the State board will consider ascertained trends as to changes in population, industries, and other social and economic factors. (See Art. III, sec. 2.)

(1) Economic desirability of the project; i. e., its relation to unemployment and revival of industry.

(3) The soundness of the project from an engineering and technical standpoint.

(4) The financial ability of the applicant to complete the work and to reasonably secure any loans made by the United States.

(5) The legal enforceabiltiy of the securities to be purchased by the United States or of any lease to be entered into between the applicant and the United States.

SECTION 7. Preferences.—(1) Projects integrated with and consistent with a State plan are to be preferred to the isolated or inconsistent. (2) Projects which can be started promptly are to be preferred to those requiring delay. (3) Projects near centers of unemployment are to be preferred.

SECTION 8. Tests for the grant to public bodies. —The President is empowered to make grants, to States, municipalities, or other public bodies, for the construction, repair, or improvement of any project approved by him, not in excess of 30 per cent of the cost of the labor and materials employed upon such project. The terms are to be such as the President shall prescribe.

The President has prescribed and the Administrator will apply the following test to enable him to determine whether to make the grant, and if so, to what extent: The social and economic significance of the project and its relative importance in the comprehensive national program of public works contemplated by the act, and the extent its construction will provide employment and purchasing power in the vicinity.

(367) The following classes of projects will be preferred as to the grant:

(1) Waterworks projects not unduly burdening the community with debt and necessary for its health and convenience; (2) sewer projects of the same character; (3) sewage-disposal projects sufficiently comprehensive to render a river or lake system, used by many communities, safe as a water supply, and other sewage-disposal projects; (4) other projects, which, like the foregoing, are regenerative, i. e., tend to stimulate further projects, such as highways, bridges, and tunnels, opening of new territory for homes and industry, projects for the transmission of electrical energy into territories not now served. The President, in determining whether to allow or withhold the grant, will also consider to what extent the budget of the applicant is balanced or in process of balancing and will prefer those public bodies which put their finances in order.

The grant will not be allowed unless the public body either (a) has power to sell to the United States its bonds in sufficient amount to reimburse the United States for its outlay (less the grant if allowed) in connection with the project and enters into a contract so to do and to complete the project, or (b) has power to convey the site of the project to the United States and contracts so to do, and to pay rental sufficient to reimburse the United States for its outlay less the grant if allowed, and to complete the project, or (c) is in process of securing the necessary powers and the Administrator is convinced that such powers will be obtained, or (d) in special cases as the President may determine.

ARTICLE IV. THE STATE ADVISORY BOARDS AND STATE ENGINEER (P. W. A.)

SECTION 4. The immediate program.

The immediate program shall include only such projects as (1) can be started within 30 days; (2) are safe and sufficient from an engineering standpoint; (3) are necessary and convenient from a social standpoint; (4) the applicant has a balanced budget, is in process of bal-

(368) ancing it, or action toward such balancing is in good faith assured.

(It is agreed that on the appeal either party may refer to and use any part of this document, and that, if deemed necessary, the original exhibit shall be transmitted by the Clerk of the United States District Court to the Circuit Court of Appeals.)

PLAINTIFFS' EXHIBIT #38.

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

Washington, D. C.

RESOLUTION OF SPECIAL BOARD FOR PUBLIC WORKS

RE: GREENWOOD COUNTY, SOUTH CAROLINA

WHEREAS, by resolution dated June 20, 1934, the Administrator and this Board included in the comprehensive program a certain project of Greenwood County, South Carolina, for the construction of a hydro-electric plant and allotted a sum not to exceed $2,767,000 for the purpose of aiding by way of loan and grant, the financing of said project:

WHEREAS, by resolution dated June 27, 1934, said resolution was reconsidered:

WHEREAS the Acting Deputy Administrator recommends that said allotment be increased in the amount of $85,000 by reason of certain necessary changes in plans and specifications:

RESOLVED, that the Administrator and the Special Board include in the comprehensive program a project for the construction of a hydro-electric plant, comprising an earthen dam across the Saluda River, a 15,000 KW generating station with necessary control equipment, transmission lines and rural distribution, substan-

(369) tially in accord with Docket 3972, and allot a sum of not to exceed $2,852,000 for the purpose of aiding by way of loan and grant, the financing of such project, subject to the execution of a contract, satisfactory to the Administrator, between the United States of America and Greenwood County, South Carolina.

Board approval November 7, 1934 3972
Presidental approval November 8, 1934

PLAINTIFFS' EXHIBIT #38.

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

Washington, D. C.

RESOLUTION OF SPECIAL BOARD FOR PUBLIC WORKS

RE: GREENWOOD COUNTY, SOUTH CAROLINA

Resolved that the Administrator and the Special Board include in the comprehensive program a project for the construction of a hydro-electric plant comprising an earthen dam across the Saluda River, a 15,000-kw generating station with necessary control equipment and approximately 90 miles of high and low tension distribution lines, by "Greenwood County", South Carolina, substantially in accord with Docket No. 3972, and allot a sum not to exceed $2,767,000, for the purpose of aiding by way of a loan and grant, the financing of such project, subject to the execution of a contract satisfactory to the Administrator between the United States of America and "Greenwood County".

Board Approval 6/20/34
Presidential Approval 6/27/34

3972

(370) NON FEDERAL PUBLIC WORKS

That are Deemed Desirable

List No. 92

(Old "200" List)

Recommended by

THE SPECIAL BOARD FOR PUBLIC WORKS

Confidential

June 20, 1934.

* * *

3972 Greenwood Co., S. C. Electric Plant 2,767,000 L&G
F.D.R.

* * *

NON FEDERAL PUBLIC WORKS

That are Deemed Desirable

List No. 158
AMENDATORIES, RESCISSIONS, and SPECIALS

Recommended by

THE SPECIAL BOARD FOR PUBLIC WORKS

Confidential

November 7, 1934.

* * *

3972 Greenwood Co. S. C. Hydro-Elec. plant 85,000 L&G
(Amendatory) F.D.R.

(371) **EXHIBIT #41.**

POWER CONTRACT BETWEEN GREENWOOD COUNTY BY ITS FINANCE BOARD AND THE CITY OF NEWBERRY.

This contract is conditional upon the approval of a loan by and from the Government of the United States, and complete approval by the Public Works Administration of the agreements herein.

This agreement, made and entered into this 18 day of June, 1934, pursuant to Revenue Bond Act, approved May 8, 1933, (Statutes of 1933 page 411), passed by the Legislature of the State of South Carolina and other laws permitting the construction of municipal power plants, between Greenwood County represented by Greenwood County Finance Board, hereinafter called the "Power Plant", and its successors and assigns and the City of Newberry, South Carolina, hereinafter called "The City".

NOW, THEREFORE, For and in consideration of the mutual covenants herein contained, the parties hereto mutually covenant and agree as follows:

1. TERM OF CONTRACT: This contract shall become operative upon the completion of the proposed hydro-electric project and when sufficient water has been impounded to supply adequate power, all of which is expected to come to pass in the year 1936, and shall continue in effect for a period of not less than five years from that time.

2. POWER SUPPLY: The Power Plant will during the term hereof supply electric energy to the city for distribution or sale. The City agrees to purchase and the Power Plant to supply a minimum of 1,000,000 kilowatt hours primary power per year. The word primary, as herein used, means power that is furnished continuously and not interrupted on account of lack of water supply. In addition to the specified minimum, The City agrees to purchase and the Power Plant agrees to supply The City's power requirements up to a maxi-

(372) mum of 3,600,000 kilowatt hours per year. The Power Plant agrees to furnish additional energy at the same rate above 3,600,000 kilowatt hours a year if it has this additional energy available. Said energy at approximately 60 cycles per second and approximately 2300 volts.

3. POWER RATE: The City agrees to pay the Power Plant not later than the 15th of each month for all power consumed during the preceding calendar month at a uniform rate of seven and one-half mills ($0.0075) per kilowatt hour measured by meters on the low tension side of the main step down transformers located at the City of Newberry.

4. GENERAL PROVISIONS: The Power Plant will furnish energy as agreed upon *continuously* so far as reasonable diligence and n odern equipment will permit, and agrees not to sell or contract to sell primary power in excess of the primary power which would be available under similar stream flow conditions as prevailed during the dry period of 1925-1926 as indicated by Government records from the stream gaging station at Chapells, from the proposed power plant as contemplated or may be enlarged. The Power Plant further agrees to construct and maintain a loop or double transmission line on remote lines of poles to The City from Buzzards Roost Power Plant. This power line will be built of the most modern lightning-proof equipment which it is practical to use. The Power Plant will also install satisfactory voltage regulators at the City of Newberry.

5. The City of Newberry depends solely upon electrical energy for pumping water for domestic and other consumption and fire prevention. This being an absolute necessary, it is understood and agreed for these reasons that in case of partial failure of power supply or in any event where some customers will of necessity have to be cut off from the power supply that the needs of the City of Newberry will have precedence.

6. Negotiations are now under way to procure the use of a local steam auxiliary for standby purposes at the City of Newberry. It is agreed that honest and continued efforts will be made to bring this arrangement to a satisfactory conclusion.

(373) 7. This contract is contingent upon Greenwood County, S. C., sharing ownership and profits from Buzzard Roost Power project on Saluda River with Newberry County, S. C., in proportion to electric power consumed in Newberry County, S. C.

IN WITNESS WHEREOF, The parties have hereunto signed their names the day and year first above written.

APPROVED:

HARRY W. LOMINICK,
Chairman Commissioners of Public Works.

THE CITY OF NEWBERRY,
By
Mayor

AS TO GREENWOOD COUNTY

D. T. DUNCAN
J. C. CORLEY

GREENWOOD COUNTY BY ITS FINANCE BOARD,
By E. L. BROOKS,
Chairman

E. I. DAVIS,
Secretary.

IN THE PRESENCE OF:

C. A. MAY
H. W. SCHUMPERT
AS TO CITY OF NEWBERRY

PLAINTIFFS' EXHIBIT #41.

POWER CONTRACT BETWEEN GRENDEL MILLS, PANOLA COTTON MILLS AND GREENWOOD COUNTY BY ITS FINANCE BOARD.

This contract is conditional upon its approval by the Public Works Administration and the approval of a loan by the P.W.A. for the construction of the proposed hydro-electric development.

This agreement entered into this 30 day of May, 1934, pursuant to Revenue Bond Act, approved May 8,

(374) 1933, (Statutes of 1933, page 411), passed by the Legislature of the State of South Carolina, and other laws permitting the construction of municipal power plants, between Greenwood County, represented by Greenwood County Finance Board, hereinafter called the "Power Plant" and its successors and assigns, and Panola Cotton Mills and Grendel Mills, private corporations doing business in the County of Greenwood, South Carolina, hereinafter called "Cotton Mills",

NOW, THEREFORE, for and in consideration of the Mutual covenants herein contained, the parties hereto mutually covenant and agree as follows:

1. Term of Contract: This contract shall become operative upon the completion of the proposed hydro-electric project and when sufficient water has been impounded to supply adequate power, all of which is expected to come to pass during the year 1936 and shall continue in effect for a period of not less than five years.

2. Power Supply: The Power Plant will during the term hereof supply secondary electric power to cotton mills. The cotton mills agree to purchase and the Power Plant to supply the entire power requirements of the Cotton Mills with the following exceptions. Secondary power is defined as power available during normal and wet seasons of river flow but which is not available during seasons of low flow. The supply of power may be discontinued at the option of the Power Plant at intermittent periods at which times the Power Plant will give twenty-four hours notice to Cotton Mills to give them an opportunity to prepare to use their auxiliary sources of power.

3. Power Rate: All power consumed will be paid for at the uniform rate of five mills ($0.005) per kilowatt hour. Payment for energy used in any calendar month shall be due on the fifteen of the succeeding month.

4. Delivery of Power: The Power Plant will provide a transformer station at Panola Mill on the property of Panola Mill and deliver power at 2300 volts at this point for the use of both Panola and Grendel Mills.

(375) IN WITNESS WHEREOF, the parties have hereto signed their names the day and year first above written.

GREENWOOD COUNTY
BY FINANCE BOARD
FOR GREENWOOD
COUNTY,
By E. L. BROOKS,
Chairman.
E. I. DAVIS,
Secretary.

PANOLA COTTON
MILLS,
By L. E. FOSTER,
Gen. Supt. & Chairman
Bd. of Directors.

GRENDEL MILLS,
By L. E. FOSTER,
Gen. Supt.
Gen. Supt. & Chairman
Bd. of Directors.

IN THE PRESENCE OF:
D. T. DUNCAN
J. R. ABNEY.

PLAINTIFFS' EXHIBIT #41.

POWER CONTRACT BETWEEN GREENWOOD COUNTY MUNICIPAL POWER PLANT AND THE TOWN OF NINETY SIX, SOUTH CAROLINA

This contract is conditional, upon the approval of a loan by and from the Government of the United States, and complete approval by the Government of the agreements herein.

THIS AGREEMENT, made and entered into this day of , 193 , pursuant to Revenue Bond Act, #465 (299), approved May 8, 1933, passed by the Legislature of the State of South Carolina, and other laws permitting the construction of municipal power plants, between the Greenwood County Municipal Power Plant, hereinafter called the "Power Plant", and its successors and assigns and the Town of Ninety Six, South Carolina, incorporated under the laws of the State of South Carolina and lying within the limits of the Count yof Greenwood, South Carolina, hereinafter called the "Town".

(376) WHEREAS, the Power Plant is being constructed and operated for the mutual benefit of the County of Greenwood and its citizens to improve the living conditions in rural communities and the towns and is not organized or doing business for profit with the exception of any surplus which might be applied for the relief of taxation.

NOW, THEREFORE, for and in consideration of the mutual covenants herein contained, the parties hereto mutually covenant and agree as follows:

1. TERM OF CONTRACT: This contract shall become operative upon the completion of the proposed hydro-electric project and when sufficient water has been impounded to supply adequate power, all of which is expected to come to pass in the year of 1936, and shall continue in effect until midnight January 1, 1957.

2. POWER SUPPLY: The Power Plant will during the term hereof, supply electric energy to the Town for the purpose of distribution and resale. The Town agrees to purchase, and the Power Plant to supply, the entire power requirements of the Town, except as herein specified. Said energy will be delivered in the form of three phases, alternating current at approximately 60 cycles per second and approximately 2300 volts. The maximum amount of electricity (called the reserve power) which the Power Plant agrees to supply is 500 K. V. A. but the Town may, upon securing the consent of the Power Plant, and in conformity with such additional or supplemental agreements as the parties may enter into, increase such maximum demand.

The Power Plant expects to supply under this agreement approximately five hundred thousand (500,000) kilowatt hours per year at an approximate uniform monthly rate of consumption. However, the Power Plant has the option of supplying any additional energy which the Town needs up to the full capacity of the hydro-electric plant and its auxiliaries as they now exist or may be increased.

3. POINT OF DELIVERY: The electric energy to be supplied to the Town hereunto shall be delivered at the

(377) outgoing side on main switch or switches on the low tension side of the main step-down transformer of a substation to be constructed, owned and maintained by the Power Plant. Location of this substation will be near the Ninety-Six Cotton Mill where the substation for serving the Cotton Mill will be located or some other place adjacent to the Town of Ninety-Six.

4. SCHEDULE OF RATES: Attached hereto and made a part hereof by reference, the same so incorporated herein, is a schedule of Rates. The Town agrees to pay for the energy supplied by the Power Plant at the rates fixed in Schedule which is entitled, "Greenwood County Municipal Power Plant wholesale Power Rates To Municipalities, Schedule A".

5. CONTRACT NOT TRANSFERABLE: Neither this contract nor any interest therein shall be transferred or assigned by the Town to any other party without the written consent of the Power Plant.

6. FAILURE TO MAKE PAYMENT: Payment for energy used during any calendar month shall be due on the 15th of each succeeding month. Upon failure of the Town to pay for the energy used for any calendar month within thirty days after the close of said month the Power Plant shall have the right to discontinue the supply of energy and refuse to resume delivery thereof so long as any part thereof remains unpaid. Discontinuance of supply under this Section will not relieve the Town of its liability for the agreed monthly payment during the time the supply of energy is so discontinued. To any amount remaining unpaid on the first day of the calendar month following the due date, there shall be added a penalty of one (1%) per cent and an additional one (1%) per cent shall be added on the first day of each succeeding month until the amount is paid in full.

INTERRUPTION OF SERVICE: The Power Plant will furnish energy as agreed upon continuously so far as reasonable diligence and modern equipment will permit, but the Power Plant, its officers, agents or employees shall not be liable for damages when, for any reason suspension of the operation of power systems of the Power Plant, or any part thereof, interfere with the delivery

(378) of electric energy to the Town, nor shall such interruption constitute a breach of this contract on the part of the Power Plant.

8. The Power Plant will have the right to serve direct industries within the limits of the Town of Ninety Six with demands in excess of 1000 K. V. A.

IN WITNESS WHEREOF, the parties have hereunto signed their names the day and year first above written.

GREENWOOD COUNTY MUNICIPAL POWER PLANT,

By _____

_____

_____

TOWN OF NINETY SIX,
By C. L. MOSELEY,
Chairman, Public Works Administration.

IN THE PRESENCE OF:

W. B. JETER. (Signed)

SCHEDULE A.

GREENWOOD COUNTY MUNICIPAL POWER PLANT

WHOLESALE POWER RATES TO MUNICIPALITIES

Wholesale Rate:

Demand Charge—$1.00 per K. W. per month.

Demand—Maximum integrated sixty (60) minutes period.

(379) Energy Charge:
First 100,000 Kilowatt Hours per month at 5. Mills per K. W. H.
Next 200,000 Kilowatt Hours per month at 4. Mills per K. W. H.
Over 300,000 Kilowatt Hours per month at 3. Mills per K. W. H.

In no case shall the energy charge plus the demand charge aggregate less than 7.0 Mills per K. W. H. for current consumed.

Minimum Monthly Bill:
$1.00 per K. W. per month, and in no case shall the minmium bill be less than the charge for sixty (60) per cent of the highest demand occurring during the previous consecutive twelve (12) month period.

Adjustments of Demand Charge:
(a) Demand charge may be adjusted if, and when, Power Plant deems necessary to correct for power factors lower than eighty-five (85%) per cent. Such adjustments will be made in such manner as to bring the demand charge to the equivalent of eighty-five (85%) per cent power factor.

PLAINTIFFS' EXHIBIT #41.

POWER CONTRACT BETWEEN GREENWOOD COUNTY BY ITS FINANCE BOARD AND THE LAURENS GLASS WORKS.

This contract is conditional upon the approval of a loan by and from the Government of the United States, and complete approval by the Public Works Administration of the agreements herein.

This agreement, made and entered into this 15th day of June, 1934, pursuant to Revenue Bond Act, approved May 8, 1933, (Statutes of 1933 page 411), passed by the Legislature of the State of South Carolina and other laws permitting the construction of municipal power plants, between Greenwood County represented by Greenwood County Finance Board, hereinafter called the "Power Plant", and its successors and assigns, and the

(380) Laurens Glass Works, a corporation doing business in the County of Laurens and State of South Carolina, hereinafter called the "Glass Works".

NOW, THEREFORE, For and in consideration of the mutual covenants herein contained, the parties hereto mutually covenant and agree as follows:

1. TERM OF CONTRACT. This contract shall become operative upon the completion of the proposed hydro-electric project and when sufficient water has been impounded to supply adequate power, all of which is expected to come to pass in the year 1936, and shall continue in effect for a period of not less than five years from that time.

2. POWER SUPPLY: The Power Plant will during the term hereof, supply electric energy to the Glass Works for consumption. The Glass Works agrees to purchase and the Power Plant to supply a minimum of 840,000 kilowatt hours primary power per year at an approximately average rate of consumption. The word primary as herein used, means power that is furnished continuously and not interrupted on account of lack of water supply. In addition to the specified minimum, the Glass Works agrees to purchase and the Power Plant agrees to supply The Glass Works' entire requirements up to a maximum of 1,400,000 kilowatt hours per year at an approximately average rate of consumption. The Power Plant agrees to furnish additional energy at the same rate above 1,400,000 kilowatt hours a year if it has this additional energy available. Said energy at approximately 60 cycles per second and approximately 2300 volts.

3. POWER RATE: The Glass Works agrees to pay the Power Plant not later than the 15th of each month for all power consumed during the preceding calendar month at the rates quoted in Schedule A as follows:

SCHEDULE A.

First	50,000 KWH	@	0.800¢
Next	50,000 KWH	@	0.775¢
Next	100,000 KWH	@	0.750¢
Next	100,000 KWH	@	0.725¢
Excess		@	0.700¢.

(381) The current will be measured by meters on the low tension side of the main step down transformers located at the Glass Works.

4. GENERAL PROVISIONS: The Power Plant will furnish energy as agreed upon *continuously* so far as reasonable diligence and modern equipment will permit, and agrees not to sell or contract to sell primary power in excess of the primary power which would be available under similar stream flow conditions as prevailed during the dry period of 1925-1926, as indicated by Government Records from the stream gaging station at Chappells, from the proposed power plant as contemplated or may be enlarged. The Power Plant further agrees to construct and maintain a loop or double transmission line to the Glass Works from Buzzards' Roost Power Plant. This power line will be built of the most modern lightning-proof equipment which it is practical to use.

5. Attached hereto and made a part of this agreement is an alternate form of contract. It is understood that this customer has the option of changing to this alternate form at any time before the delivery of power commences to The Laurens Glass Works.

IN WITNESS WHEREOF, The parties have hereunto signed their names the day and year first above written.

IN THE PRESENCE OF:
D. T. DUNCAN
L. M. ERWIN

LAURENS GLASS WORKS,
BY E. S. EASTERLEY,
President.

ATTEST: _____
Secretary.

GREENWOOD COUNTY BY ITS FINANCE BOARD,
By E. L. BROOKS,
Chairman.
E. I. DAVIS,
Secretary.

D. T. DUNCAN
D. B. SIZEMORE.

(382) **PLAINTIFFS' EXHIBIT #41.**

POWER CONTRACT BETWEEN GREENWOOD COUNTY MUNICIPAL POWER PLANT AND THE LAURENS GLASS WORKS

This contract is conditional upon the approval of a loan by and from the Government of the United States, and complete approval by the Government of the agreements herein.

This agreement, made and entered into this day of , 1934, pursuant to Revenue Bond Act #465 (299), approved May 8, 1933, and passed by the Legislature of the State of South Carolina, and other laws permitting the construction of municipal power plants, between Greenwood County Municipal Power Plant, hereinafter called the "Power Plant", and its successors and assigns, and the Laurens Glass Works, a private corporation doing business in the County of Laurens, South Carolina, hereinafter called the "Glass Works."

NOW, THEREFORE, for and in consideration of the mutual covenants herein contained, the parties hereto mutually covenant and agreed as follows:

1. TERM OF CONTRACT: This contract shall become operative upon the completion of the proposed hydro-electric project and when sufficient water has been impounded to supply adequate power, all of which is expected to come to pass in the year of 1936, and shall continue for a period of five years from that date.

2. POWER SUPPLY: The Power Plant will during the term hereof supply electric energy to the Glass Works for the purpose of operating machinery and other pertinent necessities. The Glass Works agrees to purchase and the Power Plant to supply the entire power requirements of the Glass Works except as herein specified. Said energy will be delivered in the form of three phase alternating current at approximately 60 cycles per second and approximately 2300 volts. The maximum amount of electricity (called the reserve power) which the Power Plant agrees to supply is 500 K. V. A., but the Glass Works may, upon securing the consent of

(383) the Power Plant, and in conformity with such additional or supplemental agreements as the parties may enter into, increase such maximum demand.

The Power Plant expects to supply under this agreement approximately one million four hundred thousand (1,400,000) kilowatt hours per year. However, the Power Plant has the option of supplying any additional energy which the Glass Works needs up to the full capacity of the hydro-electric plant and its auxiliaries as they now exist or may be increased.

3. POINT OF DELIVERY: The electric energy to be supplied to the Glass Works hereunder shall be delivered at the outgoing side on the main switch or switches on the low tension side of the main step down transformers of the substation to be constructed, owned and maintained by the Power Plant. Location of this substation will be on the property of the Glass Works at its manufacturing plant, this property to be leased to the Power Plant for the period of its contract at a rental of $1.00 per annum.

4. SCHEDULE OF RATES: Attached hereto and made a part hereof by reference, the same so incorporated herein, is a schedule of rates. The Glass Works agrees to pay for the energy supplied by the Power Plant at the rates fixed in Schedule which is entitled, "Greenwood County Municipal Power Rates to Industries, Schedule B".

5. MINIMUM DEMAND: The Glass Works agrees to purchase not less than 840,000 kilowatt hours each calendar year or in lieu of this purchase will pay a minimum of $4,000.00 per calendar year. This minimum per calendar year to be void for any specific calendar year or part thereof if the reduced power consumption of the Glass Works is caused by the Acts of God, the public enemy, the authority of law, or the acts or defaults of the Power Plant.

6. CONTRACT NOT TRANSFERABLE: Neither this contract nor any interest therein shall be transferred or assigned by the Glass Works to any other party without written consent of the Power Plant.

7. FAILURE TO MAKE PAYMENT: Payment for

(384) energy used during any calendar month shall be due on the 15th of each succeeding month. Upon failure of the Glass Works to pay for the energy used for any calendar month within thirty days after the close of said month the Power Plant shall have the right to discontinue the supply of energy and refuse to resume delivery thereof so long as any part thereof remains unpaid. Discontinuance of supply under this Section will not relieve the Glass Works of its liability for the agreed monthly payment during the time the supply of energy is so discontinued. To any amount remaining unpaid on the first day of the calendar month following the due date, there shall be added a penalty of one per cent (1%) and an additional one per cent (1%) shall be added on the first day of each succeeding month until the amount is paid in full.

8. INTERRUPTION OF SERVICE: The Power Plant will furnish energy as agreed upon continuously so far as reasonable diligence and modern equipment will permit, but the Power Plant, its officers, agents or employees shall not be liable for damages when, for any reason suspension of the operation of power systems of the Power Plant, or any part thereof, interfere with the delivery of electric energy to the Glass Works, nor shall such interruption constitute a breach of this contract on the part of the Power Plant. The Power Plant will make adjustments of the monthly minimum during the period of interruption.

IN WITNESS WHEREOF, The parties have hereunto signed their names the day and year first above written.

IN THE PRESENCE OF:

_____

_____

_____

_____

(COPY)

GREENWOOD COUNTY MUNICIPAL POWER PLANT,

By _____
Chairman.

_____
Secretary.

THE LAURENS GLASS WORKS,

By _____

(385) SCHEDULE B.

Greenwood County Municipal Power Rates To Industries Available.

To industrial power users having demands in excess of 10 K. W. Service at primary distribution voltage or secondary distribution voltage at discretion of PURCHASE.

DEMAND CHARGE

$1.15 per K. W. per month.

Demand-Maximum integrated thirty (30) minutes period.

ENERGY CHARGE

First	10,000 K. W. H. per month at	11.5 Mills per K. W. H.
Next	25,000 K. W. H. per month at	6.9 Mills per K. W. H.
Next	65,000 K. W. H. per month at	4.6 Mills per K. W. H.
Next	400,000 K. W. H. per month at	3.45 Mills per K. W. H.

EXCESS

Over	500,000 K. W. H. per month at	2.875 Mills per K. W. H.

In no case shall the energy charge plus the demand charge aggregate less than 6.5 mills per K. W. H. for current consumed.

MINIMUM MONTHLY BILL.

$1.15 per K. W. of maximum demand, but in no case shall the maximum demand for billing purposes be taken as less than 60% of the maximum monthly demand billed during the preceding twelve (12) consecutive months period.

583

(386) SEASONABLE LOADS

PURCHASER may in its discretion discontinue service on seasonal loads and establish a minimum payment for idle months sufficient to cover cost involved.

ADJUSTMENT OF DEMAND.

Demand charge may be adjusted if, and when, power plant deems necessary to correct for power factor lower than eighty-five per cent (85%). Such adjustments shall be made in such manner as to bring the demand charge to the equivalent of eighty-five per cent (85%) power factor.

PLAINTIFFS' EXHIBIT #41.

POWER CONTRACT BETWEEN THE FARMERS OIL MILL AND GREENWOOD COUNTY BY ITS FINANCE BOARD.

This contract is conditional upon its approval by the Public Works Administration and the approval of a loan by the P. W. A. for the construction of the proposed hydro-electric development.

This agreement entered into this 18 day of June, 1934, pursuant to Revenue Bond Act, approved May 8, 1933. (Statues of 1933, page 411), passed by the Legislature of the State of South Carolina, and other laws permitting the construction of municipal power plants, between Greenwood County, represented by Greenwood County Finance Board, hereinafter called the "Power Plant", and its successors and assigns, and the Farmers' Oil Mill, a private corporation doing business in the County of Newberry, South Carolina, hereinafter called the "Oil Mill".

NOW, THEREFORE, For and in consideration of the mutual covenants herein contained, the parties hereto mutually covenant and agree as follows:

1. TERM OF CONTRACT: This contract shall become operative upon the completion of the proposed

(387) hydro-electric project and when sufficient water has been impounded to supply adequate power, all of which is expected to come to pass during the year 1936 and shall continue in effect for a period of not less than five years.

2. POWER SUPPLY: The Power Plant will during the term hereof supply primary electric power to the Oil Mill. The Oil Mill agrees to purchase and the Power Plant to supply the entire power requirements of the Oil Mill. Primary power, as herein used, is defined as power available continuously and is not interrupted on account of lack of water supply.

3. POWER RATE: All power consumed will be paid for at the uniform rate of one cent ($0.01) per kilowatt hour. Payment for energy used in any calendar month shall be due on the fifteenth of the succeeding month.

4. DELIVERY OF POWER: Current will be measured by meters located at the plant of the Farmers' Oil Mill at approximately 2200 volts.

5. The Oil Mill agrees to use a minimum of 550,000 kilowatt hours of power per year.

IN WITNESS WHEREOF, The parties have hereunto signed their names the day and year first above written.

THE FARMERS' OIL MILL,
BY J. H. WICKER, MGR.
Manager.

AS TO GREENWOOD) D. T. DUNCAN
J. C. CORLEY

GREENWOOD COUNTY BY ITS FINANCE BOARD FOR GREENWOOD COUNTY,
BY E. L. BROOKS,
Chairman.
E. I. DAVIS,
Secretary.

IN THE PRESENCE OF:
D. T. DUNCAN
MRS. O. M. COBB.

(388) **PLAINTIFFS' EXHIBIT #41.**

POWER CONTRACT BETWEEN GRENCO OIL COMPANY AND GREENWOOD COUNTY BY ITS FINANCE BOARD

This contract is conditional upon its approval by the Public Works Administration and the approval of a loan by the P. W. A. for the construction of the proposed hydro-electric development.

This agreement entered into this 12th day of June, 1934, pursuant to Revenue Bond Act, approved May 8, 1933 (Statutes of 1933, page 411) passed by the Legislature of the State of South Carolina, and other laws permitting the construction of municipal power plants, between Greenwood County, represented by Greenwood County Finance Board, hereinafter called the "Power Plant" and its successors and assigns, and the Grenco Oil Mill, a private corporation doing business in the County of Greenwood, South Carolina, hereinafter called "Grenco".

NOW, THEREFORE, for and in consideration of the mutual covenants herein contained, the parties hereto mutually covenant and agree as follows:

1. TERM OF CONTRACT: This contract shall become operative upon the completion of the proposed hydro-electric project and when sufficient water has been impounded to supply adequate power, all of which is expected to come to pass during the year 1936, and shall continue in effect for a period of not less than five years.

2. POWER SUPPLY: The Power Plant will during the term hereof supply primary electric power to Grenco. Grenco agrees to purchase and the Power Plant to supply the entire power requirements of Grenco. Primary power, as herein used, is defined as power available continuously and is not interrupted on account of lack of water supply.

3. POWER RATE: All power consumed will be paid for at the uniform rate of one cent ($0.01) per kilowatt

(389) hour. Payment for energy used in any calendar month shall be due on the fifteenth of the succeeding month.

4. DELIVERY OF POWER: The Power Plant will provide a transformer station at the Grenco Oil Mill on the property of Grenco and deliver power at 2300 volts.

5. Grenco agrees to use a minimum of 450,000 kilowatt hours of power per year.

IN WITNESS WHEREOF, the parties have hereto sigend their names the day and year first above written.

6. See below.

IN THE PRESENCE OF: GRENCO OIL COMPANY
BY H. L. ALLEN
D. T. Duncon) As to Gen. Mgr. and Treasurer.
) Power
D. B. Sizemore) Plant.

IN THE PRESENCE OF: GREENWOOD COUNTY
BY ITS FINANCE
Elizabeth Barrett) As to BOARD FOR GREEN-
C. H. Burnett) Grenco. WOOD COUNTY,
By _____
Chairman
E. I. DAVIS
Secretary.

6. Continued.

Attached hereto and made a part of this agreement is an alternate form of contract. It is understood that this customer has the option of changing to this alternate form at any time before the delivery of power commences to THE GRENCO OIL COMPANY.

(390) SCHEDULE B.

Greenwood County Municipal Power Rates to Industries, Available.

To industrial power users having demands in excess of 10 K. W. Service at primary distribution voltage or secondary distribution voltage at discreton of PURCHASER.

Demand Charge:

$1.15 per K. W. per month.

Demand-Maximum integrated thirty (30) minute period.

Energy Charge:

First	10,000 K. W. H. per month at	11.5 Mills per K. W. H.
Next	25,000 K. W. H. per month at	6.9 Mills per K. W. H.
Next	65,000 K. W. H. per month at	4.6 Mills per K. W. H.

Excess

Over	500,000 K. W. H. per month at	2.875 Mills per K. W. H.

In no case shall the energy charge plus the demand charge aggregate less than 6.5 Mills per K. W. H. for current consumed.

Minimum Monthly Bill:

$1.15 per K. W. of maximum demand, but in no case shall the maximum demand for billing purposes be taken as less than 60% of the maximum monthly demand billed during the preceding twelve (12) consecutive months period.

Seasonal Loads:

PURCHASER may in its discretion discontinue serv-

(391) vice on seasonal loads and establish a minimum payment for idle months sufficient to cover costs involved.

Adjustment of Demand:

Demand charge may be adjusted if, and when, power plant deems necessary to correct for power factor lower than eighty-five (85%) per cent. Such adjustments will be made in such manner as to bring the demand charge to the equivalent of eighty-five (85%) per cent power factor.

PLAINTIFFS' EXHIBIT #41.

POWER CONTRACT BETWEEN GREENWOOD COUNTY MUNICIPAL POWER PLANT AND GRENCO OIL COMPANY

This contract is conditional upon the approval of a loan by and from the Government of the United States, and complete approval by the Government of the agreements herein.

THIS AGREEMENT, made and entered into this day of , 193 , pursuant to Revenue Bond Act #465 (299), approved May 8, 1933, passed by the Legislature of the State of South Carolina, and other laws permitting the construction of municipal power plants, between the Greenwood County Municipal Power Plant, hereinafter called the "Power Plant", and its successors and assigns, and Grenco Oil Company, a pricate corporation doing business in the County of Greenwood, South Carolina, hereinafter called "Grenco".

WHEREAS, the Power Plant is being constructed and operated for the mutual benefit of the County of Greenwood and its citizens in order to improve the living conditions in rural communities and the towns, and is not organized or doing business for the profit with the exception of any surplus which might be applied for the relief of taxation.

NOW, THEREFORE, For and in consideration of the mutual covenants herein contained, the parties hereto mutually covenant and agree as follows:

(392) 1. TERM OF CONTRACT: This contract shall become operative upon the completion of the proposed hydro-electric project and when sufficient water has been impounded to supply adequate power, all of which is expected to come to pass in the year of 1936, and shall continue for a period of five years from that date.

2. POWER SUPPLY: The Power Plant will during the term hereof supply electric energy to Grenco for the purpose of operating machinery and other pertinent necessities. Grenco agrees to purchase, and the Power Plant to supply, the entire power requirements of Grenco, except as herein specified. Said energy will be delivered in the form of three phases, alternating current at approximately 60 cycles per second and approximately 2300 volts. The maximum amount of electricity (called reserve power) which the Power Plant agrees to supply is 500 K. V. A. but Grenco may, upon securing the consent of the Power Plant, and conformity with such additional or supplemental agreements as the parties may enter into, increase such maximum demand.

The Power Plant expects to supply under this agreement approximately seven hundred and fifty thousand (750,000) kilowatt hours per year. However, the Power Plant has the option of supplying any additional energy which Grenco needs up to the full capacity of the hydro-electric plant and its auxiliaries as they now exist or may be increased.

3. POINT OF DELIVERY: The electric energy to be supplied to Grenco hereunder shall be delivered at the outgoing side on main switch or switches on the low tension side of the main step-down transformers of a substation to be constructed, owned and maintained by the Power Plant. Location of this substation will be on the property of Grenco at its manufacturing plant, this property to be leased to the Power Plant for the period of its contract at a rental of $1.00 per annum.

4. SCHEDULE OF RATES. Attached hereto and made a part hereof by reference, the same so incorporated herein, is a schedule of rates. Grenco agrees to pay for the enery supplied by the Power Plant at the rates fixed in Schedule which is entitled, "Green-

(393) wood County Municipal Power Rates to Industries, Schedule B".

5. MINIMUM DEMAND: Grenco agrees to purchase not less than 400,000 kilowatt hours each calendar year or in lieu of this purchase will pay a minimum of $4000.00 per calendar year. This minimum per calendar year to be void for any specific calendar year or part thereof if the reduced power consumption of Grenco is caused by the acts of God, the public enemy, the authority of law or the acts or defaults of the Power Plant.

6. CONTRACT NOT TRANSFERABLE: Neither this contract nor any interest therein shall be transferred or assigned by the Grenco to any other party without the written consent of the Power Plant.

7. FAILURE TO MAKE PAYMENT: Payment for energy used during any calendar month shall be due on the 15th of each succeeding month. Upon failure of Grenco to pay for the energy used for any calendar month within thirty days after the close of said month the Power Plant shall have the right to discontinue the supply of energy and refuse to resume delivery thereof so long as any part thereof remains unpaid. Discontinuance of supply under this Section will not relieve Grenco of its liability for the agreed monthly payment during the time the supply of energy is so discontinued. To any amount remaining unpaid on the first day of the calendar month following the due date, there shall be added a penalty of one (1%) per cent and an additional one (1%) per cent shall be added on the first day of each succeeding month until the amount is paid in full.

8. INTERRUPTION OF SERVICE: The Power Plant will furnish energy as agreed upon continuously so far as reasonable diligence and modern equipment will permit, but the Power Plant, its officers, agents or employees shall not be liable for damages when, for any reason suspension of the operation of power systems of the Power Plant, or any part thereof, interfere with the delivery of electric energy to Grenco, nor shall such interruption constitute a breach of this contract on the part of the Power Plant. The Power Plant will make adjustments of the monthly minimum during the period of interruption.

(394) IN WITNESS WHEREOF, the parties have hereunto signed their names the day and year first above written.

GREENWOOD COUNTY MUNICIPAL POWER PLANT,

By _____

_____

_____

GRENCO OIL COMPANY,

By _____

IN THE PRESENCE OF:

_____

_____

(COPY)

PLAINTIFFS' EXHIBIT #41.

POWER CONTRACT BETWEEN GREENWOOD COUNTY BY ITS FINANCE BOARD AND THE CITY OF GREENWOOD.

This contract is conditional upon the approval of a loan by and from the Government of the United States, and complete approval by the Public Works Administration of the agreements herein.

This Agreement, made and entered into this 6 day of June 1934, pursuant to Revenue Bond Act, approved May 8, 1933, (Statutes of 1933, page 411), passed by the Legislature of the State of South Carolina and other laws permitting the construction of municipal power plants, between Greenwood County represented by Greenwood County Finance Board, hereinafter called the "Power Plant", and its successors and assigns, and the City of Greenwood, South Carolina, hereinafter called "The City".

NOW, THEREFORE, For and in consideration of the mutual covenant herein contained, the parties hereto mutually covenant and agree as follows:

1. TERM OF CONTRACT: This contract shall become operative upon the completion of the proposed hydro-electric project and when sufficient water has been

(395) impounded to supply adequate power, all of which is expected to come to pass in the year 1936, and shall continue in effect for a period of not less than five years from that time.

2. POWER SUPPLY: The Power Plant will during the term hereof, supply electric energy to the City for distribution or sale. The City agrees to purchase and the Power Plant to supply a minimum of 3,000,000 kilowatt hours primary power per year at an approximately average rate of consumption. The word primary, as herein used, means power that is furnished continuously and not interrupted on account of lack of water supply. In addition to the specified minimum, The City agrees to purchase and the Power Plant agrees to supply the City's entire power requirements up to a maximum of 7,000,000 kilowatt hours per year at an approximately average rate of consumption. The Power Plant agrees to furnish additional energy at the same rate above 7,000,000 kilowatt hours a year, if it has this additional energy available. Said energy at approximately 60 cycles per second and approximately 2300 volts.

3. POWER RATE: The City agrees to pay the Power Plant not later than the 15th of each month for all power consumed during the preceding calendar month at a uniform rate of seven and one-half mills ($0.0075) per kilowatt hour measured by meters on the low tension side of the main step down transformers located at the City of Greenwood.

4. GENERAL PROVISIONS: The Power Plant will furnish energy as agreed upon *continuously* so far as reasonable diligence and modern equipment will permit, and agrees not to sell or contract to sell primary power in excess of the primary power which would be available under similar stream-flow conditions as prevailed during the dry period of 1925-1926, as indicated by Government Records from the stream gaging station at Chappels, from the proposed power plant as contemplated or may be enlarged. The Power Plant further agrees to construct and maintain a loop or double transmission line to The City from Buzzards Roost Power Plant. This power line will be built of the most modern lightning-proof equipment which it is practical to use. The Power

(396) Plant will also install satisfactory voltage regulators at the City of Greenwood.

IN WITNESS WHEREOF, The parties have hereunto signed their names the day and year first above written.

THE CITY OF GREENWOOD,
By W. A. BARNETT,
Mayor.
GREENWOOD COUNTY BY ITS FINANCE BOARD,
By E. L. BROOKS,
Chairman,
E. I. DAVIS,
Secretary.

IN THE PRESENCE OF:

D. T. DUNCAN
J. H. COLEMAN

PLAINTIFFS' EXHIBIT #41.

POWER CONTRACT BETWEEN GREENWOOD COUNTY BY ITS FINANCE BOARD AND THE CITY OF LAURENS

This contract is conditional upon the approval of a loan by and from the Government of the United States, and complete approval by the Public Works Administration of the agreements herein.

This agreement, made and entered into this 15th day of June, 1934, pursuant to Revenue Bond Act, approved May 8, 1933, (Statute of 1933 page 411), passed by the Legislature of the State of South Carolina, and other laws permitting the construction of municipal power plants, between Greenwood County represented by Greenwood County Finance Board, hereinafter called the "Power Plant", and its successors and assigns, and the City of Laurens, South Carolina, hereinafter called "The City".

NOW, THEREFORE, For and in consideration of the mutual covenants herein contained, the parties hereto mutually covenant and agree as follows:

(397) 1. TERM OF CONTRACT: This contract shall become operative at the option of the City either upon the completion of the proposed hydro-electric project and when sufficient water has been impounded to supply adequate power, or at any time prior to January 1st following the completion of plant, all of which is expected to come to pass in the year 1936, and shall continue in effect for a period of not less than five years from that time, provided that if the Power Plant is not ready to furnish power as provided herein on or before January 1, 1937, The City shall have the option to declare this contract null and void.

2. POWER SUPPLY: The Power Plant will during the term hereof supply electric energy to the City at its plant in the City of Laurens for distribution or sale. The City agrees to purchase and the Power Plant to supply a minimum of 900,000 kilowatt hours primary power per year at an approximately average rate of consumption. The word primary, as herein used, means power that is furnished continuously and not interrupted on account of lack of water supply. In addition to the specified minimum, The City agrees to purchase and the Power Plant agrees to supply The City's entire power requirements up to a maximum of 2,000,000 kilowatt hours per year at an approximately average rate of consumption. The Power Plant agrees to furnish additional energy at the same rate above 2,000,000 kilowatt hours a year if it has this additional energy available. Said energy at approximately 60 cycles per second and approximately 2300 volts.

3. POWER RATE: The City agrees to pay the Power Plant not later than the 15th of each month for all power consumed during the preceding calendar month at the rates quoted in Schedule A, as follows:

SCHEDULE A.

First	50,000 K. W. H.	@	0.800¢
Next	50,000 K. W. H.	@	0.775¢
Next	100,000 K. W. H.	@	0.750¢
Next	100,000 K. W. H.	@	0.725¢
Excess		@	0.700¢

(398) The current will be measured by meters on the low tension side of the main step-down transformers located at the Laurens Plant.

4. GENERAL PROVISIONS: The Power Plant will furnish energy as agreed upon *continuously* so far as reasonable diligence and modern equipment will permit, and agrees not to sell or contract to sell primary power in excess of the primary power which would be available under similar stream flow conditions as prevailed during the dry period of 1925-1926 as indicated by Government Records from the stream gaging station at Chappells, from the proposed power plant as contemplated or may be enlarged. The Power Plant further agrees to construct and maintain a loop or double transmission line to the City from Buzzards Roost Power Plant. This power line will be built of the most modern lightning-proof equipment which it is practical to use. The Power Plant will also install satisfactory voltage regulators at the City of Laurens. It is understood that joint ownership will be entered into by Greenwood County, Laurens County, and Newberry County to the extent that each County will share in any advantages, privileges and benefits granted in the proportion to which power from the Power Plant is sold in each County.

IN WITNESS WHEREOF, The parties have hereunto signed their names the day and year first above written.

IN THE PRESENCE OF: THE CITY OF LAURENS,
BY JOE F. SMITH,
Mayor.

WILLIE I. ALEXANDER
RICHARD BABB.
D. T. DUNCAN
D. B. SIZEMORE.

ATTEST: M. P. SIMPSON,
Clerk.

GREENWOOD COUNTY
BY ITS FINANCE
BOARD,
By E. L. BROOKS,
Chairman.
E. I. DAVIS,
Secretary.

(COPY)

(399) **PLAINTIFFS' EXHIBIT #45.**

Plaintiffs introduced in evidence as their Exhibit 45' Regulations of the South Carolina Board of Health Governing the Control of the Mosquito Production on Impounded Water, issued February 25, 1932, the material parts of which are as follows:

"3b. In the area to be occupied by the reservoir, its branches, bights, and indentations, all brush, trees, undergrowth, logs, stumps, and similar objects, which, if not removed would float on the surface of the impounded water soon after the impounding of the water, and all of the above material that is lying on the ground or remaining in the original or new positions, which would probably cause collections of floatage to gather, and thus constitute conditions favorable to the protection of larvae of mosquitoes capable of conveying malaria, shall be removed and burned, or otherwise disposed of in a manner satisfactory to the Executive Committee of the State Board of Health, prior to the impounding of the water.

"3c. In the area to be occupied by the reservoir, its branches, bights, and indentations, all brush, trees and undergrowth which would pierce the surface at low-water level, shall be cut off at least one-foot below such low-water level to prevent the collection and anchorage of any possible floatage, rafts, etc.

"3d. The shore line of the reservoir, its branches, bights, and indentations from minimum low-water level to a line five feet horizontally beyond maximum high-water level, shall be cleared and maintained clear of all brush, and undergrowth. Large trees need not be removed from this strip."

(400) **STATEMENT OF EVIDENCE.**

PART IV

DEFENDANTS' EXHIBIT #2.

This exhibit is the application of The Finance Board of Greenwood County to the Federal Power Commission for a license to construct the Buzzard Roost project and contains, in a letter from the Finance Board to the Commission, the following description of the project:

"On February 9, 1934, Greenwood County made application for a license to construct a Municipal Hydro-Electric Power Plant at the Buzzard's Roost Dam site on Saluda River."

Certain extracts from this exhibit are attached to the bill of complaint as exhibit II, and reference is made thereto.

DEFENDANTS' EXHIBIT #3.

FEDERAL POWER COMMISSION

LICENSE AFFECTING NAVIGABLE WATERS
PROJECT NO. 1267, SOUTH CAROLINA
GREENWOOD COUNTY.

(pp. 1-2) WHEREAS, by Act of Congress approved June 10, 1920 (Stat. 1063), designated therein as "The Federal Water Power Act", and hereinafter called "the Act", the Federal Power Commission hereinafter called "the Commission", is authorized and empowered to issue licenses for water power projects upon any part of the public lands and reservations and upon or affecting any of the navigable waters of the United States; and

WHEREAS, GREENWOOD COUNTY, hereinafter called "the Licensee", a municipality organized and existing under the laws of the State of South Carolina and having its office and principal place of business in the city of Greenwood, in the State of South Carolina, has made application in due and proper form to the Commis-

(401) sion for a license for a power project designated as project No. 1267 on the records of the Commission, and for authority to construct, operate, and maintain at the Buzzard Roost site in the vicinity of Chappells, in the Counties of Greenwood, Newberry, and Laurens, State of South Carolina, certain project works, as hereinafter described, necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, and in the Saluda River; and

WHEREAS, the Commission, pursuant to the provisions of Section 23 of the Act, at its meeting of January 15, 1934, found that the interests of interstate and foreign commerce would be affected by the proposed construction; and

* * * * * *

WHEREAS, the Commission has found that said project, as hereinafter described, is best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, of water power development, and of other beneficial public uses; and

* * * * * *

NOW, THEREFORE, the Commission hereby issues this license to the Licensee for the purpose of constructing, operating and maintaining said project works, necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in the Saluda River, and constituting a part of the project hereinafter described; * * *.

(p. 14) IN WITNESS WHEREOF, the Federal Power Commission has caused its name and seal to be hereto signed and affixed by its Chairman, Frank R. McNinch, this 11th day of February, 1935, pursuant to an order adopted at its meeting on November 2, 1934.

FEDERAL POWER COMMISSION
By FRANK R. McNINCH,
Chairman.

Attest:

G. W. LINEWEAVER,
Secretary.

(Seal)

(402) **DEFENDANTS' EXHIBIT #4.**

CERTIFIED RECORDS OF THE FEDERAL POWER COMMISSION

The following is an extract from the minutes of a meeting of the Federal Power Commission held January 15, 1934:

Declaration of Intention

Finance Board for Greenwood County, S. C. (DI-122)

The following action was taken:

WHEREAS, the Finance Board for Greenwood County, South Carolina filed a declaration of intention on December 10, 1933, to construct a water-power project at the Buzzards Roost site on the Saluda River, affecting lands in Greenwood, Newberry, and Laurens Counties, South Carolina; and

WHEREAS, the Saluda and Broad Rivers join at Columbia, South Carolina, to form the Congaree River; and the Congaree and Wateree Rivers join 52 miles below Columbia to form the Santee River; said Congaree and Santee Rivers being navigable waters of the United States; and it appearing:

(1) That the proposed project works would consist of an earthen dam, reservoir, power house, and appurtenant works;

(2) That the dam would create a power head of 60 feet; that the reesrvoir would have total storage capacity of 275,000 acre-feet, and usable capacity of about 100,000 acre-feet with 10-foot drawdown; and that the declarant proposes to install machinery having total capacity of 21,900 horsepower, in three units of 7,300 horsepower each;

(3) That the proposed reservoir could be so operated

(403) as materially to reduce navigable depths in the Congaree and Santee Rivers.

Now, therefore, having considered said declaration of intention, together with reports, correspondence, and other information pertaining thereto, the Commission *finds*:

That the interests of interstate and foreign commerce would be affected by the proposed construction.

D. I. No. 122
Finance Board for Greenwood
County, S. C. January 12, 1934.

MEMORANDUM FOR THE COMMISSION:

1. The Finance Board for Greenwood County, South Carolina, by letter dated December 8, 1933 (received in this office December 10, 1933), filed a declaration of intention to construct a water-power project at the Buzzards Roost site on the Saluda River in South Carolina. Pursuant to your instructions, I have investigated the proposed construction, and as a result thereof this report is submitted. The project will be referred to hereinafter as the Buzzards Roost project.

* * * * * * *

4. Attached to this memorandum is a sketch map showing the location of the Buzzards Roost project, and the principal streams of the Santee River system. It will be noted that the Saluda and Broad Rivers join at Columbia to form the Congaree River; and that in turn the Congaree and Wateree join 52 miles below Columbia to form the Santee River. The Santee-Congaree River is navigable for vessels with draft of 4 feet, from its mouth to Columbia, a distance of 195 miles. The Saluda River has never been improved for navigation by the United States. The annual report of the Chief of Engineers for 1889 contains a report by Captain Frederic V. Abbot Corps of Engineers, from which the following statements are quoted:

(404). "The fall in the lower 60 miles (of the Saluda River) is 3.9 feet per mile. In the next 65 miles it is 5.6 feet per mile, and in the next 10 miles, or up to the crossing of the Air Line Railway, it is 6 feet per mile. In the whole distance of 135 miles it is 4.9 feet per mile. These figures . . . show the impossiblity of improvement (of Saluda River) except at great cost. . . . It is unworthy of improvement."

5. The statements contained in the above quotation refer to improvement for navigation. Power development was not under consideration at that time. The following statement is quoted from the annual report of the Chief of Engineers for 1908, part I, page 323:

"Preliminary examination of Saluda River, South Carolina, between Columbia and Hollow Creek.—Reported dated December 19, 1907, is printed in House Document No. 651, Sixtieth Congress, first session. The locality is not considered worthy of improvement by the General Government."

6. It appears from the foregoing statements and quotations that the Saluda River is not navigable waters of the United States within the meaning of section 3 of the act. It is unquestionably a nonnavigable stream at and above the Buzzards Roost dam site, and below the dam site to the head of the existing Saluda Reservoir (Lake Murray). There are no navigation locks at the Saluda Dam. The discharge at the Buzzards Roost site is estimated as ranging from a minimum of about 200 c. f. s. to a maximum of about 55,000 c. f. s. The small low-water flow and the steep slope of the stream seem to preclude serious consideration of its improvement for navigation.

* * * * * * *

11. The application of the Lexington Water Power Company, of Columba, South Carolina, filed July 1, 1927, for a license for a water-power project on the Saluda River at the Dreher Shoals site, was treated by the Commission as a declaration of intention, and at its meeting of July 8, 1927, the Commission made a finding "that the interests of interstate or foreign commerce would be affected by such proposed construction." The principal

(405) reason for assuming jurisdiction was "that the project, if not properly regulated, would have an adverse effect on the navigable capacities of the Congaree and Santee Rivers". Substantially the same reasons exist for assuming jurisdiction at the Buzzards Roost site. It is true that the Saluda Reservoir is very large in comparison with the proposed Buzzards Roost Reservoir; but the later reservoir is sufficiently large that the entire flow could be shut off for days. The reregulating effect of the Saluda Reservoir will tend to prevent the effects of Buzzards Roost Reservoir operation from being noticeable in the Congaree and Santee Rivers. The fact remains, however, that if this Commission had not permitted the construction of the Saluda Reservoir, the operation of the proposed Buzzards Roost Reservoir would substantially affect the interests of navigation.

Conclusions

12. The Saluda River is not "navigable waters of the United States" within the meaning of section 3 of the act.

* * * * * * *

16. I recommend that the Commission find that the interests of interstate and foreign commerce would be affected by the proposed construction.

(sd) ROGER B. McWHORTER,
Chief Engineer.

McW:ARH

Also certified and attached is a map of South Carolina showing location of the project, detail map showing Dam Site Topography, made by D. T. Duncan, Engineer for Greenwood County, containing the following approval of the War Department:

(406) WAR DEPARTMENT

Approved so far as the plans affect the navigable capacity of navigable waters of the US

Oct. 1934 DOUGLAS McARTHUR,
Acting Secretary of War

Oct. 26, 1934 G. B. PILLSBURY,
Brig. Gen. Acting Chief of Engineers.

Also a general design drawing showing plans, elevations and sections of structures, prepared by D. T. Duncan, Engineer, bearing the following approval of the War Department:

WAR DEPARTMENT

Approved so far as the plans affect the navigable capacity of navigable waters of the US.

Oct. 1934 DOUGLAS McARTHUR,
Acting Secretary of War.

October 26, 1934 G. B. PILLSBURY,
Brig. Gen. Acting Chief of Engineers.

DEFENDANTS' EXHIBIT #5.

Defendants introduced in evidence as their Exhibit #5 Document No. 96, House of Representatives, 73rd Congress, First Session, and it is agreed that on the appeal either party may refer to and use any part of this document and that if deemed necessary the original exhibit shall be transmitted by the Clerk of the United States District Court to the Circuit Court of Appeals.

(407) **DEFENDANTS' EXHIBIT #7.**

BUZZARD ROOST HYDRO-ELECTRIC DEVELOPMENT.

TOTAL ESTIMATED COST OF PROJECT

NO.	ITEM	TOTAL
1.	Preliminary drilling (Completed)	$ 6,611.35
2.	Acquisition of land—12,566 acres @ $17.50 per acre	219,905.00
3.	Transmission right of way—102 mi. @ $300.00	30,600.00
4.	Clearing Reservoir—6,000 acres @ $30.00	180,000.00
5.	General Contract (Bids received) Low Bidder	622,190.22
6.	Hydraulic Turbines (Bids Received) Low Bidder	168,327.50
7.	Electrical Generators, Substation, etc. (Bids Received) Low Bidder	324,544.00
8.	Gates, Racks, Crane, etc. (Bids Received) Low Bidder	74,350.00
9.	Station Wiring	9,600.00
10.	Main transmission lines (44,000 volts) 102 Mi. at $3,040 per Mi.	310,000.00
11.	Substations	161,817.00
12.	Re-routing Duke Power Company 100,000 volt transmission line, 2 Mi.	26,185.00
14.	Telephone connection to Power House from Greenwood exchange	2,000.00
13.	Re-routing Bell Telephone Line	6,000.00
15.	Raising S.A.L.R.R. over Saluda River	29,430.36
16.	Relocating S.A.L.R.R., over Cane Creek	45,128.30
17.	Raising C & W.C.R.R., over Saluda River	34,196.10
18.	Rip-rap on fills at Cothran's bridge on Highway #7	1,600.00
19.	Raising bridge on highway #10 over Reedy River	9,241.25
20.	Raising Boyd's bridge over Saluda River on Highway #10	1,418.20
21.	Raising Smith's bridge over Saluda	

(408)	River	3,700.62
22.	Sodding downstream side of dam	2,424.00
23.	Erecting Superintendents at $25 per day (Bid price)	5,000.00
24.	Engineering	154,001.89
25.	Legal and Administrative	55,000.00
26.	Interest during construction	75,000.00
27.	Advertising contracts	300.00
28.	Printing bonds	1,000.00
29.	Contingencies	292,429.21
	TOTAL ALLOTMENT	$2,852,000.00

DEFENDANTS' EXHIBIT #23.

COMPARISON OF ENGINEER'S ESTIMATE AND SUCCESSFUL CONTRACTORS' BID ON ITEMS UPON WHICH BIDS HAVE BEEN RECEIVED

No.		Engineers Estimate F. P. C. License Application	Contractors' Bid
1	Access Railroad	$ 2,940.00	Reflected in price other items
2	Fill in Dam	219,218.20	$ 207,290.07
3	Diverting Culvert	14,000.00	Not required in present layout.
4	Stripping dam base M/3	7,000.00	3,333.50
5	Core trench excavations	6,800.00	14,852.95
6	Clearing and grubbing dam area	862.50	2,300.00
5	Core trench excavations	6,800.00	14,852.95
7	Gravel beneath rip-rip	1,750.00	Not required
8	Rip-rap on upstream face of dam	7,400.00	6,204.00
9	Rock excavation at Power House Spillway	94,200.00	97,500.00
10	Earth Excav. at Power House Spillw.	3,800.00	6,500.00
11	Total concrete in Power House	216,844.00	198,282.50
12	Total reinforcing Steel P House Spillway	6,426.00	7,200.00

(409) 13	Earth excavation for rock fill toe		5,227.00
14	Tainter Gates—erected	50,000.00	57,050.00
15	Sluice Gates in Place	60,000.00	16,300.00
16	Trash Racks	7,700.00	4,400.00
17	Power House Superstructure complete with crane	33,100.00	36,100.00
18	Hydraulic Equipment installed	157,200.00	176,327.50
19	Electrical Generators, substation, etc. installed	361,781.00	339,544.00
20	Miscellaneous Struct. Steel Railing, etc.		5,000.00
21	Services of Erecting Supt.		5,000.00
	TOTALS	$1,251,022.00	$1,188,411.72
	SAVING	$62,610.28 to date.	

DEFENDANTS' EXHIBIT 24.

ANNUAL OPERATION AND FIXED CHARGES

1. Debt Services	$138,880.00
2. Insurance	3,000.00
3. Operating Costs:	
Plant Maintenance & Supplies	12,000.00
General Manager	5,000.00
Plant Supt.	3,000.00
4 Operators @ $1,200.00	4,800.00
Machinist	1,000.00
Laborers including Mosquite Control	5,000.00
Transmission Maintenance & Supplies	6,000.00
Line Foreman	1,800.00
2 Linemen @ $1,200.00	2,400.00
2 Groundmen	1,800.00
Meter reader & Service man	1,200.00
Book-keeper—Stenographer	1,200.00
Telephone, Office Supplies, Traveling expenses, etc.	2,400.00
(Total operating costs—$47,600.00)	
TOTAL ANNUAL FIXED COSTS	$189,480.00

DEFENDANTS' EXHIBIT 25.

AMORTIZATION TABLE

GROSS INCOME:

30,000,000 K.W.H. Primary Power @ 8.5 Mills=	$255,000.00
11,000,000 K. W. H. Secondary Power @ 5 Mills=	55,000.00
TOTAL ANNUAL INCOME	$310,000.00

PRINCIPAL:

Allotment	$2,852,000.00
Grant	682,000.00
Principal to be repaid	$2,170,000.00

Year end	Gross Revenue	Operating Cost	Insurance	Net Revenue	Interest @ 4%	Pay on Principal	Unpaid Balance	Accumulated Surplus
1	$310,000	$47,600	$3,000	$259,400	$86,800	$50,000	$2,120,000	$122,600
2	"	"	"	"	84,800	55,000	2,065,000	242,200
3	"	"	"	"	82,600	60,000	2,005,000	359,000
4	"	"	"	"	80,200	65,000	1,940,000	473,200
5	"	"	"	"	77,600	70,000	1,870,000	585,000

(411)

6	$310,000	$47,600	$3,000	$259,400	74,800	70,000	1,800,000	699,600
7	"	"	"	"	72,000	75,000	1,725,000	812,000
8	"	"	"	"	69,000	75,000	1,650,000	927,400
9	"	"	"	"	66,000	75,000	1,575,000	1,045,800
10	"	"	"	"	63,000	80,000	1,495,000	1,162,200
11	"	"	"	"	59,800	85,000	1,410,000	1,276,800
12	"	"	"	"	56,400	90,000	1,320,000	1,389,800
13	"	"	"	"	52,800	90,000	1,230,000	1,506,400
14	"	"	"	"	49,200	95,000	1,135,000	1,621,600
15	"	"	"	"	45,400	95,000	1,040,000	1,740,600
16	"	"	"	"	41,600	100,000	940,000	1,858,400
17	"	"	"	"	37,600	105,000	835,000	1,975,200
18	"	"	"	"	33,400	110,000	725,000	2,091,200
19	"	"	"	"	29,000	115,000	610,000	2,206,600
20	"	"	"	"	24,400	115,000	495,000	2,326,600
21	"	"	"	"	19,800	115,000	380,000	2,451,200
22	"	"	"	"	15,200	120,000	260,000	2,575,400
23	"	"	"	"	10,400	125,000	135,000	2,699,400
24	"	"	"	"	5,400	125,000	10,000	2,828,400
25	"	"	"	"	400	10,000	0	3,077,400

(412) **DEFENDANTS' EXHIBIT 27**

DUKE POWER COMPANY

General Office

Charlotte, N. C.

October 14, 1933.

Mr. Ben M. Sawyer,
Chief Highway Commissioner,
Columbia, South Carolina.

Dear Sir:—

With reference to yours of October 11th, I beg to hand you herewith rates covering service to the South Carolina Highway Commission.

Rates at each point of delivery for Primary Power less than 100 K.W. are as follows:

Kilowatt-hours per month		Per kilowatt-hour
First	50	5.0 cents
Next	250	4.0 "
"	1,200	2.5 "
"	7,500	1.8 "
"	11,000	1.6 "
All over		1.4 "

The monthly minimum charge for the above class of power shall be $1.25 per kilowatt for each kilowatt contracted for.

Rates at each point of delivery for Primary Power of over 100 K.W. are as follows:

Kilowatt-hours per month		Per kilowatt-hour
First	100,000	1.400 cents
Next	100,000	1.375 "
"	100,000	1.350 "
"	100,000	1.300 "
"	100,000	1.250 "
"	100,000	1.175 "
All over		1.100 "

(413) All power of the above class used by the Consumer in excess of the maximum number of kilowatt hours per month permitted to be used under the contract of such Consumer shall be paid for at the rate of 1.40 cents per kilowatt-hour, provided, however, that the company shall be under no obligation to furnish power in excess of the maximum amount required to be furnished by its contract.

The monthly minimum charge for the above class of power shall be $1.25 per kilowatt for each kilowatt contracted for. All meters to be located at points of delivery. Service is subject to the general conditions of the Company covering sale of power, as now on file with the Railroad Commission of South Carolina.

Delivery under the foregoing schedules can be made from any of the existing substations of the Power Company which are now properly equipped and manned for the supplying of a continuous utilities service such as is required by the Highway Commission.

If delivery is to be made at points other than the above, which may require additional facilities and apparatus, or which may require additional operators or attendants so that the continuous service required by the commission can be supplied, the Power Company will assume only such fair part of the additional expenses as the volume of the additional business will justify.

In our conference with you and your representatives we were told that in the use of this power it is not the purpose of the Highway Commission to enter into competition with the utilities companies in areas already served, and the foregoing is based upon this understanding.

Yours very truly,

(s) CHAS. I. BURKHOLDER,
Vice-President.

CIB.FB

(414) **DEFENDANTS' EXHIBIT 28.**

SOUTHERN PUBLIC UTILITIES COMPANY

General Office

Charlotte, North Carolina.

October 13, 1933.

Mr. Ben M. Sawyer,
Chief Highway Commissioner,
Columbia, South Carolina.

Dear Sir:

Referring to your letter of October 11th, I beg to advise that we have not sooner furnished you with rates for your rural electrification program for the reason that we have been endeavoring to investigate the various projects and to obtain as much information regarding same as possible. This work has not yet been completed, however, it is not our purpose to in any way delay you and I hand you herewith copy of our Schedule Number 2 for electric power service, and we shall be glad to render you service under this schedule, subject to the following conditions:

(1) Availability of Service. We cannot tell you where the service is available until we are informed at what point you desire service and the type and character of service which you desire.

(2) Points of Metering. The service is to be metered you at the point of delivery and each delivery point shall be billed separately at the enclosed rates.

(3) Competition. We have understood from our conference with you and your representatives that it is not the purpose of the Highway Commission to enter into competition with the utility companies in areas already served; that you will not do so.

(4) Delivery. That in making delivery of electric current the Utility Company will not be put to any greater

(415) expense than is customarily absorbed in making delivery to customers using similar amounts of power in South Carolina. We understand that this service is to be taken from some point on existing lines of the Utility Company and that the Utility Company will not be expected to make any line investment in connection therewith.

We understand that the details of your request for electric power will be furnished and when this is done, we will be glad to prepare and submit to you a contract for your approval.

Yours very truly,

(s) E. C. MARSHALL,
President.

SOUTHERN PUBLIC UTILITIES COMPANY

Schedule Number 2

Electric Power Service

5	cents	per	K.	W.	H.	for	the	first	50	K. W. H.	used	per month
4	"	"	"	"	"	"	next	250	"	"	"	"
2.5	"	"	"	"	"	"	"	1,200	"	"	"	"
1.8	"	"	"	"	"	"	"	7,500	"	"	"	"
1.6	"	"	"	"	"	"	"	11,000	"	"	"	"
1.4	"	"	"	"	"	"	"	80,000	"	"	"	"
1.35	"	"	"	"	"	"	"	50,000	"	"	"	"
1.3	"	"	"	"	"	"	"	100,000	"	"	"	"
1.25	"	"	"	"	"	"	"	100,000	"	"	"	"
1.2	"	"	"	"	all consumption in excess of 350,000 K. W. H. used per month							

MINIMUM

The Consumer agrees to pay as a minimum service charge, whether current equal to that amount in value shall be used or not.

$1.00 per month for each H.P. connected up to 25 H.P.
.75 per month for each H.P. connected from 26 up to 50 H. P.

(416) .50 per mnth for each H.P. connected from 51 H.P. or over.

These rates same as those in published Schedule No. 2 (S.P.U.Co.)

DEFENDANTS' EXHIBIT NO. 29.

THE BUZZARD ROOST POWER DEVELOPMENT PROJECT

Geography

The proposed Buzzard's Roost dam and powerplant are to be located on the Saluda River in the southwestern part of Newberry County, the eastern part of Greenwood County and three miles south of the southeastern corner of Laurens County. The proposed dam site is about one-half mile north of the Southern Railway bridge and one-quarter mile north of the bridge on State Highway No. 22. The ponded area will be about twenty miles in length and will average a mile in width. The shoreline of the lake will be at the 440 contour line. This places the lake level 60 feet above the level of the Saluda River, which is 380 feet at this point. The Saluda is to be dammed by a 2,200 foot earth fill extending from a point just southeast of Buzzard's Roost across a narrow flood plain to the river bluff on the western side of the river. The end of the ridge at the southeast end of the dam rises 60 feet above the level of the lake.

Buzzard's Roost lies at the northwestern end of a ridge which has been cut by stream erosion into a succession of knobs with a northwest-southeast trend. Buzzard's Roost Hill is surrounded by a semicircular depression opening at both ends into the Saluda River Valley and draining in opposite directions. A small creek that flows southwest through this depression has been responsible for the formation of the small water gap or narrows on the southeast side of this hill.

It would be logical to suppose that the powerplant and spillway would be located at the western end of

(417) the ridge. However, the specifications call for a dam and spillway to be built at the narrows mentioned above. Such a location will have many advantages over one located at any other point. In other words, by making a short, comparatively shallow cut through the divide a concrete dam, powerplant and spillway 300 feet long may be built upon a solid rock foundation and a natural dam six-tenths of a mile in length can be utilized to hold back the waters of the reservoir.

Geology

The portion of South Carolina embraced within the basin of the Saluda River is one of the oldest in the world. The original rock were sedimentary, consisting of sandstones, shales, and limestones deposited in an ocean which covered this area in a very early period of geological history. After a long period of metamorphic changes, during which the rocks were folded and faulted, these original rock were changed to quartzites, slates, mica schists, quartz schists and gneisses. In the folding of this rock the axes had a prevailing northeast-southwest direction. However, locally some of these strikes are from the northwest to the southeast. This is true in the particular area under discussion.

After these rocks were folded a long period of erosion, equal in time to all recorded geological history, has reduced this region to a pene-plain. In the formation of such a pene-plain the harder and more resistant layers of rock stand as ridges or hills while the softer portions have been removed by erosion. In this case it is an extremely hard durable quartz schist that has been responsible for the ridges and knobs already discussed under the geography of the area. These hard rock layers have been responsible for the formation of other notable elevations in South Carolina such as Henry's Mountain, Nanny Knob, Graycourt Knob, and Little Mountain. These hard resistant layers dip at high angles to the northeast and have nearly a northwest strike. The ridges and hills in the vicinity of the dam site are approximately one-fourth mile wide at the bottom and vary from 50 to 100 feet in width at the top. The average elevation of these hills is about 80 feet above the river

(418) and because of the southeast dip the steeper slope of the rock mass faces northwest. During the period of time that the Saluda River and its tributaries have been sculpturing this area there have been many stream adjustments. Piracy, shifting of river channels through meanders, and other features of river adjustment have been responsible for many unusual features noted in the vicinity of the dam site.

It is a very interesting fact that all nature since the beginning of geologic time seems to have been working in this area for the express purpose of forming favorable geological conditions at this dam site. There are no unfavorable engineering problems to be noted. The following favorable conditions should be emphasized:

The earth dam 2,200 feet in length can be anchoed on a firm foundation of quartz schist. This is the rock exposed in all of the keystone borings put down along the line where the dam is to be built. This rock is encountered at an average depth of 20 feet. The first 15 feet of flood plain material consists of a sandy soil with a clay subsoil and from five to six feet of a pure white sand clean enough to be used in some forms of construction work. The earth dam will be tied to both banks at a point favorable both as regards topography and material. The material for the earth dam can be obtained in part from excavating the diversion channel and in part from the area adjacent to the earth dam site. The material at both of these places is clayey enough to make an impervious fill. The building of the earth dam presents no difficulties.

The concrete dam, spillway and powerhouse will be built along the upturned layers of the hard quartzite schist which has been responsible for forming the outstanding elevations of the area. At the surface this rock is now seen in boulder formation. Farther down it may pass into a ledge, but if it does not, it would be sufficiently firm to support the concrete dam, spillway and powerhouse without fear of any settling. These rock have been in position for such a long period of time that they have become thoroughly adjusted to each other, the

(419) joints filled with clay until the whole mass has become the finest kind of a monolithic natural dam. That there is no seepage of water through this layer is shown by the fact that the drainage of the area west of the ridge is so retarded by impervious layers that the soil is saturated to near the top of the hard layer northeast of the rock but not southwest of it. When the water table is higher than the hard layer, the drainage is from it to the Saluda. During a dry spell the water table falls below the top of the hard layer and the stream dries up. However, below the top of the impervious layer the soil is still saturated to such an extent that in many places it resembles a quicksand.

The excavation for the tailrace will be made entirely through mantle rock except in one or two places where the bed rock comes closer than the average to the surface. The approach channel also can be dredged entirely through incoherent material. Wash borings in the small valley between the two ridges show no sign of a rock bottom. This, and the area where the tailrace is to be excavated, are doubtless former channels of some stream which have since been filled with flood plain material and talus.

Conclusions

The Piedmont Plateau area as a whole offers few difficulties from a geological standpoint in the construction of dams, reservoirs and powerplants. The harder formations have been developed through long cycles of erosion into resistant ridges; the softer ones into tight impervious valleys. This generalization is especially true in the Buzzard's Roost area. The Saluda River is one of the oldest streams in the world. It has endeavored for milleniums to level the resistant ridges that cross its path and without avail. There is no evidence to show that a lake with very little erosive power can break or seep through any of the natural barriers of the Buzzard's Roost area.

F. H. H. CALHOUN.

Mch. 1st, 1935

(420) **DEFENDANTS' EXHIBIT 35.**

Defendants' Exhibit 35 is a list of the land options obtained by Greenwood County in connection with the Buzzard Roost project. The list contains options which have expired as well as those which are now in effect. The total acreage covered by the options, including those expired as well as those now in effect, is approximately 11,940 acres; the total option price $188,015; and the average price per acre approximately $15.83. See testimony of defendants' witness, Emmett I. Davis.

DEFENDANTS' EXHIBIT 36.

The defendants introduced in evidence as their Exhibit 36 Minute Book No. 1 of the Finance Board of Greenwood County, which included, among the resolutions passed by said Board relative to said Buzzard Roost project the resolution of October 6, 1934, a copy of which, marked Exhibit "I", is attached to and made a part of the original bill of complaint, and also the resolution which is attached to and made a part of the original answer of Greenwood County and its Finance Board.

MINUTES OF THE GREENWOOD COUNTY FINANCE BOARD

Greenwood, S. C.

June 15, 1935.

The Finance Board for Greenwood County held a special meeting in office of County Supervisor at Court House, Greenwood, South Carolina, at eight o'clock A. M., June 15, 1935, with all members of Board present.

Meeting was called to order by E. L. Brooks, Chairman.

E. I. Davis stated object of meeting to be for the purpose of considering the amendment of Sub-Section B of Section Four of a Resolution entitled "A RESOLUTION PROVIDING FOR THE ISSUANCE OF TWO MILLION, TWO HUNDRED TWENTY THOUSAND

(421) DOLLARS ($2,200,000) REVENUE BONDS OF THE COUNTY OF GREENWOOD, SOUTH CAROLINA, FOR THE CONSTRUCTION OF A HYDRO-ELECTRIC POWER PLANT IN ACCORDANCE WITH THE PROVISIONS OF ACTS 299, ACTS OF SOUTH CAROLINA, 1933, AS AMENDED, AND ACT 1095, ACT OF SOUTH CAROLINA 1934." Adopted October 6, 1934 by the Finance Board of Greenwood County which Section requires Finance Board of Greenwood County to set aside annually from Revenue derived from operation of Greenwood County Hydro-Electric Plant a sum of not less than $50,000.00 to build up a reasonable reserve for depreciation of said system.

After general discussion, R. C. Lominick moved the following Resolution be adopted:

WHEREAS, Section Twenty-Two of South Carolina Act No. 299, 1933 as amended enable Counties, among other things, to build municipal power plants and requires the municipality to set aside annually a "Depreciation Fund" and

WHEREAS, said Act does not specify any specific amount or percentage to be set aside as a "Depreciation Fund" and

WHEREAS, the Public Works Administration does not require Greenwood County to set up a "Depreciation Fund" except such as may be required by local statute, and

WHEREAS, the Finance Board for Greenwood County considers, in view of the fact that Greenwood County Hydro-Electric Power Revenue Bonds mature serially, that the sum of $50,000 is excessive and unnecessary as a "Depreciation Fund".

THEREFORE, BE IT RESOLVED, by the Finance Board for Greenwood County in meeting assembled this 15th day of June 1935 that Sub-Section B of Section Four of a Resolution entitled, "A RESOLUTION PROVIDING FOR THE ISSUANCE OF TWO MILLION, TWO HUNDRED TWENTY THOUSAND DOLLARS

(422) ($2,220,000.00) REVENUE BONDS OF THE COUNTY OF GREENWOOD, SOUTH CAROLINA, FOR CONSTRUCTION OF A HYDRO-ELECTRIC POWER PLANT IN ACCORDANCE WITH THE PROVISIONS OF ACT 299 ACTS OF SOUTH CAROLINA, 1933, AS AMENDED, AND ACT 1095, ACT OF SOUTH CAROLINA 1934". Approved October 6, 1934 be amended so as to read as follows:

(b) INTO THE DEPRECIATION FUND, a sum of not less than $10,000 to build up a reasonable reserve for depreciation of said system:

This motion was seconded by E. I. Davis and after general discussion a vote was called by the Chairman on adoption of this action.

Those voting for motion were: E. L. Brooks, R. C. Lominick, M. G. Bowles, S. A. Agnew, and E. I. Davis.

Those voting against motion: None.

The Chair declared motion carried.

It was moved by E. I. Davis, seconded by M. G. Bowles and carried that the meeting adjourn.

E. L. BROOKS, Chairman. E. I. DAVIS, (Seal) Secretary.

I hereby certify that the above is a true and exact copy of resolution passed by the Finance Board for Greenwood County on June 15, 1935; and that said resolution is properly spread on Finance Board for Greenwood County Official Minute Book No. 1, at page 106-107.

E. I. DAVIS, (Seal)
Secretary Finance Board for
Greenwood County

DEFENDANTS' EXHIBIT 39.

Defendants introduced in evidence as their Exhibit 39 a copy of the Federal Power Commission, National

(423) Power Survey, Interim Report, Power Series No. 1. Plaintiffs duly objected to the introduction of said report on the ground that the same is irrelevant, incompetent and immaterial. Subject to said objection it is agreed that it shall be admissible for either party to present a copy of this exhibit, certified by the Clerk of the U. S. District Court, to the Circuit Court of Appeals at the time of the argument.

DEFENDANTS' EXHIBIT 42.

The defendants introduced in evidence as their Exhibit 42 agreement dated March 14, 1917, between Wateree Power Company and Yadkin River Power Company, the Wateree Power Company now being a part of the Duke Power Company, and the Yadkin River Power Company now being a part of the Carolina Light & Power Company. This contract provides in part as follows:

"WITNESSETH:

"THAT WHEREAS the Yadkin Company is desirous of purchasing electrical power and energy from the Wateree Company as hereinafter set forth, and

"WHEREAS the Wateree Company proposes to construct a hydro-electric plant of large capacity on the Wateree River, at a point approximately seven (7) miles northwest from the City of Camden, South Carolina, which plant is hereinafter referred to as the Wateree Station, and will endeavor to have same completed and ready for operation by June 1, 1919.

"NOW, THEREFORE, in consideration of the covenants and agreements hereinafter contained, the electrical power and energy to be delivered and the sums of money to be paid, the said parties hereto for themselves, their successors and assigns have mutually agreed and do agree with each other as follows:

"FIRST: The Wateree Company agrees to sell and deliver to the Yadkin Company at said Wateree Station,

(424) (hereinafter referred to as the point of delivery) and the Yadkin Company agrees to purchase and take from the Wateree Company, at said point of delivery, upon the terms and conditions herein contained, for and during the period of thirty (30) years beginning with the first day of June, 1919, except as modified hereinafter by pargaraph seventh and thereafter unless and until either party hereto shall have given to the other party hereto, three years' previous notice in writing of its intention to terminate this contract, electrical power and energy, as follows, to-wit: During the year beginning June 1, 1919, or such extended date as hereinafter provided for and ending twelve months thereafter, 7500 kilowatts but not more than 32,850,000 kilowatt hours per year, except as hereinafter provided in Section Nine (9) and Ten (10); during the year beginning June 1, 1920 or such extended date as hereinafter provided for and ending twelve months thereafter and during each subsequent year except as hereinafter provided for in Section Nine (9) until the expiration or other termination of this contract, 14,000 kilowatts but not more than 61,320,000 kilowatt hours per year. Nothing in this contract contained shall be construed to obligate Wateree Company to at any time furnish a peak in excess of 14,000 kw,

"SECOND: The electric power and energy to be delivered hereunder shall be of the character commonly known as three-phase, alternating at approximately 60 cycles per second periodicity, and at approximately 105,000 volts, with the right upon the part of said Yadkin Company from time to time to vary said voltage whenever it wishes within the safe limits of the Wateree Company's generating and transforming apparatus. The Yadkin Company agrees to build and maintain, at its own cost and expense, on or before the first day of June, 1919, and to connect to the circuit of the Wateree Company, at said point of delivery, an electric transmission line with conductors not smaller than number naught Brown & Sharpe guage copper or equivalent, arranged for three-phase, sixty cycle circuit, and with insulation suitable for standard voltage of approximately 105,000 volts. Each of the parties agrees to erect at the aforesaid point of delivery a dead-end strain tower equipped with suitable line disconnecting switches.

(425) "It is understood and agreed, however, that should Yadkin Company desire to have any portion of the power and energy to be supplied hereunder delivered at the generator bus bar voltage of the Wateree Plant, then in such event Wateree Company agrees to furnish such portion of the above specified amount of power and energy as may from time to time be required by Yadkin Company at the generator bus bar voltage of the Wateree Station, said power to be delivered and metered to Yadkin Company at some convenient point immediately adjoining the Wateree Station, and adjacent to the above mentioned point of delivery, at which point Wateree Company shall furnish, without charge, sufficient ground space for such substation structure, transformers, switches, and other necessary or desirable apparatus or appliances, as Yadkin Company may desire to install. Said low voltage power and energy shall be transformed by Yadkin Company at or near point of delivery through suitable transformers, it being understood and agreed that said power shall not be delivered directly to any transmission or distribution line of Yadkin Company, without such transformation. Wateree Company agrees that said lower voltage power and energy shall be delivered under the same terms and conditions, and at the same price as provided hereunder for delivery of power and energy at 105,000 volts, and that its operators at Wateree Station shall without charge attend said substation and apparatus of Yadkin Company located at this point, and shall obey the reasonable instructions of Yadkin Company with regard to operation of said substation, transformers, switches, etc. Yadkin Company shall at all times have access to premises of Wateree Company for inspection, operation or repair of said substation apparatus installed on Wateree Company's premises.

"Yadkin Company agrees at its own cost to equip its transmission line to be erected hereunder, with a suitable telephone circuit.

"FOURTH: The maximum amount of power and energy which the Wateree Company shall be required to furnish hereunder during any week from Saturday mid-night to Saturday mid-night, except as hereinafter pro-

(426) vided in Sections Nine (9) and Ten (10), shall be 631,731 kilowatt hours during the year beginning June 1, 1919, or such extended date as hereinafter provided for and ending twelve months thereafter; and 1,179,231 kilowatt hours during the year beginning June 1, 1920 or such extended date as hereinafter set out, and ending twelve months thereafter, and during each subsequent year thereafter except as provided for in Section Nine (9) hereafter until the expiration or other termination of this contract; and for the purpose of supplying the power herein contracted for, the Wateree Company agrees to operate for the Yadkin Company hydraulic and electrical apparatus capable of delivering at any and all times the full amount of kilowatts which the Yadkin Company may then be entitled to receive at the point of delivery at 80% power factor. The Wateree Company agrees that it will so arrange, either through operation or separate generating and transforming apparatus for Yadkin Company, or otherwise, that the Wateree Company may respond promptly to any reasonable change in voltage frequency, or other operating condition of the Yadkin Company, which said Wateree Company may be called upon by said Yadkin Company to meet, provided however, that the Wateree Company shall in no event be required to furnish a greater voltage than 110,000 volts; and provided further that should the Wateree Company find it necessary or desirable to operate its station in parallel it may so do and in such event the Yadkin Company agrees to install if necessary to give it the voltage it requires all such apparatus as may be necessary to obtain such voltage and said Yadkin Company assumes all responsibility for said apparatus performing its functions if the same is operated by the employees of the Wateree Company in accordance with instructions of the Yadkin Company which said instructions the Wateree Company agrees to follow;

"In the event Yadkin Company should install regulating apparatus the Wateree Company hereby agrees to furnish suitable space adjacent to transformers outside the building for the installation of such apparatus on the low tension side of the energy to be supplied hereunder provided such space shall not exceed fifteen feet by fifteen feet square and twenty feet in height and shall

(427) also provide sufficient space for the installation of necessary bus bars and disconnecting switches, which may be necessary in the installation and operation of said voltage regulating apparatus. Wateree Company agrees, however, that in any event it will at times of parallel operation of its plant furnish a voltage of not less than 100,000 volts.

"The Wateree Company shall not be obligated to supply to the Yadkin Company during any seven days, the said amount hereinbefore specified for seven days in a less period of time than One Hundred and Forty-Four consecutive hours, nor more than 105,288 kilowatt hours in any Twenty-four (24) consecutive hours during the year beginning June 1, 1919 or such extended date as hereinafter provided for and ending twelve months thereafter, except as hereinafter provided in Sections Nine (9) and Ten (10), nor more than 196,538 kilowatt hours in any Twenty-four (24) consecutive hours during the year beginning June 1, 1920 or such extended date as hereinafter provided for, and ending twelve months thereafter, and during each subsequent year until the expiration or other termination of this contract, except as provided for in Section Nine (9).

"Nothing in this agreement shall be construed as authorizing the Wateree Company to operate its apparatus only at an 80% power factor, but it is understood and agreed that the Wateree Company may operate such apparatus at the highest practicable power factor. The Wateree Company agrees to use such standard type of generating and transmission apparatus, and so far as it is reasonably able so to do, to select and operate the receiving and rotating apparatus on its system so as to (a) avoid so-called 'hunting' of synchronous apparatus, and so as to (b) maintain as far as commercially practicable, the power factor of unity. It is agreed that should the power factor on the system of the Yadkin Company be less than 80%, the Wateree Company shall be entitled, during such time, to payment on the kilowat ampere basis of 80% power factor instead of on a kilowatt hour basis.

EIGHTH: Subject to the provisions of this contract,

(428) the Yadkin Company agrees to pay the Wateree Company for the electric power and energy supplied under the terms of this contract during the year beginning June 1, 1919 or such extended date as hereinbefore provided for, and ending twelve months thereafter, except as hereinafter provided in Section (9), the sum of One Hundred Fourteen Thousand and Nine Hundred Seventy-five Dollars ($114,975); and during the year beginning June 1, 1920 or such extended date as hereinbefore provided for and ending twelve months thereafter and during each subsequent year for a period of 18 years, except as provided for in Section Nine (9), the sum of Two Hundred Fourteen Thousand Six Hundred and Twenty Dollars ($214,620), and during the year beginning June 1, 1939 or such extended date as hereinbefore provided for, and ending twelve months thereafter, and during each subsequent year thereafter until the expiration or other termination of this contract, except as provided for in Section Nine (9), the sum of Two Hundred Forty-five Thousand Two Hundred Eighty Dollars ($245,280), payable for each year in twelve monthly installments, each of which installments shall be computed as follows: For the year beginning June 1, 1919 or such extended date as hereinbefore provided for and ending twelve months thereafter except as hereinafter provided in Sections Nine (9) and Ten (10), on a basis of Three Hundred and Fifteen Dollars ($315) per day, multiplied by the number of days in the month, for which such installment shall be paid; and for the year beginning June 1, 1920 or such extended date as hereinbefore provided for, and ending twelve months thereafter and for each subsequent year thereafter for a period of (18) eighteen years, except as provided for in Section Nine (9), on a basis of Five Hundred Eighty-eight Dollars ($588) per day, multiplied by the number of days in the month for which such installment shall be paid; and for the year beginning June 1, 1939 or such extended date as hereinafter provided for, and ending twelve months thereafter, and for each subsequent year thereafter, except as provided for in Section Nine (9), until the expiration or other termination of this contract, on a basis of Six Hundred Seventy Two Dollars ($672) per day, multiplied by the number of days in the month for which such installment shall be paid; and so long as the Wateree Com-

(429) pany shall deliver or shall be ready, willing and able to deliver the said full amount of power, the Yadkin Company shall pay for the full said amount of power on the basis specified in this section whether it shall have used the same or not, except as provided for in Section Nine (9); provided that in event Wateree Company in any Twenty-four (24) consecutive hours furnishes to Yadkin Company and the Yadkin Company receives a greater number of kilowatt hours than the daily contract amount specified hereunder, then Yadkin Company shall pay Wateree Company for such excess amount at the rate of Thirty-five one hundredths of a cent (.35¢) per kilowatt hour during a period of twenty (20) years from the date power shall first begin to be delivered hereunder and at the rate of Forty one-hundredths of a cent (.40¢) during the remaining period of the contract."

DEFENDANTS' EXHIBIT 44

Defendants introduced in evidence as their Exhibit 44 a statement of undeveloped power sites held by Duke Power Company in North Carolina, South Carolina and Georgia, with the cost of said sites, as follows:

Name of Development	Cost Per Ledger Balances April 30, 1935
Glen Alpine	195,826.51
Morganton	409,765.51
Johns River	426,092.35
Upper Mountain Island	1,680,711.00
Lansford	389,653.02
Toxaway	138,015.83
Haw River Shoals	43,367.28
Palmer Shoals	356,031.37
Middleton Shoals	742,047.76
Calhoun Falls	424,077.90
Total	4,805,588.53

(430) **DEFENDANTS' EXHIBIT 45.**

List of Plaintiffs' Former Customers

Those who were heretofore customers of the plaintiffs in the three counties, but who are not now, are as follows:—Lydia Cotton Mills, Clinton Cotton Mills, Town of Clinton, and Panola Cotton Mills.

DEFENDANTS' EXHIBIT 46.

Defendants introduced in evidence as their Exhibit 46 report on the electric utilities situation in South Carolina, dated December 31, 1931. Plaintiffs duly objected to the introduction of this report in evidence on the ground that it is irrelevant, incompetent and immaterial and that it is hearsay.

Subject to said objection of plaintiffs it is agreed that it shall be admissible for either party to present a copy of this exhibit, certified by the Clerk of the U. S. District Court, to the Circuit Court of Appeals at the time of the argument.

DEFENDANTS' EXHIBIT 47.

Defendants introduced in evidence as their Exhibit 47 Report of Federal Trade Commission on Duke Power Company and constituent system companies, the summary of said report, as given therein, being as follows:

SUMMARY OF REPORT ON DUKE POWER COMPANY

The Duke Power Company was incorporated under the laws of the State of New Jersey as Wateree Electric Company on May 1, 1917. In 1924 the charter was amended and the name changed to Duke Power Company. From 1917 until December 1, 1927, the principal operations of the company consisted of holding the capital stocks of subsidiary companies. Prior to December

(431) 1, 1927, the principal operations of the Duke power system were conducted by Southern Power Company, Catawba Power Company, Great Falls Power Company, Wateree Power Company and Western Carolina Power Company. During this period, Southern Power Company acted in the capacity of the principal operating unit of the system. It owned the transmission system and certain generating plants and purchased the power generated by the plants of the other companies. It then transmitted this power and sold the same at wholesale rates to municipalities, industries and other distributing companies.

The aforementioned companies were organized by the Duke interests and their stocks were held largely by James B. Duke and his associates. During the period from 1917 to 1925 the Duke Power Company acquired the capital stocks of the system companies owned by Mr. Duke and his associates, and they in turn subscribed to stocks of Duke Power Company.

The principal retail distribution operations of the Duke system have been conducted since 1913 through Southern Public Utilities Company. This company was organized in 1913 by the Duke interests and acquired from other system companies the retail distribution systems then owned, which were located in the States of North and South Carolina. The capital stocks of Southern Public Utilities Company were held by James B. Duke and his associates until 1925. During this year Duke Power Company offered to acquire the common stock of Southern Public Utilities Company by exchanging 1.4 shares of its common stock for each share of Southern Public Utilities Company. Through this offer, and some sundry purchases for cash, all of the outstanding common stock of Southern Public Utilities Company was acquired.

As of December 1, 1927, Southern Power Company and Great Falls Power Company were merged with the parent company, Duke Power Company. At about this time, Duke Power Company acquired the operating plants and facilities of the other subsidiary companies except those of Southern Public Utilities Company. The consideration involved in the acquisition of these assets

(432) was the cancellation of the capital stocks held by the parent company. Stated differently, Duke Power Company, as of December 1, 1927, either through merger or acquisition, took over all of the businesses of its subsidiary companies except those of Southern Public Utilities Company. From that date on, it has operated as both a holding and operating company. However, its principal operations consisted of the generation, transmission, and sale of electric power at wholesale rates. This consolidation of properties eliminated a number of companies and unified under a single operating unit the operations of the former subsidiary companies.

The generating facilities consist of 19 hydro plants with an installed capacity of 415,120 kilowatts and 5 steam plants with an installed capacity of 265,000 kilowatts. The distribution system, as of December 1, 1933, consisted of 2,762 miles of transmission lines, ranging from 550 to 115,000 volt capacity, together with the necessary substations and switching equipment. The total circuit miles of transmission lines amounted to 4,187. The history of the Duke power system is one of continued expansion and development. Largely through construction, but with some acquisitions, the Duke Power Company as now constituted has grown from an original investment of $1,418,730 in 1903 to a total of $184,000,000, as of December 31, 1933.

In addition to the installed capacity, the Duke Power Company leases one-half of the steam capacity of the Parr Shoals station of the Broad River Power Company and the Mountain Island hydro station of Southern Public Utilities Company. It also purchases power in large blocks from Carolina Aluminum Company, Lexington Water Power Company, Spartanburg Water Works and Lockhart Power Company. It also has a power exchange agreement with Carolina Power and Light Company.

During the year 1932, the system handled a total of 1,650,500,000 kilowatt hours of electric energy. Of this amount it generated 1,320,400,000 kilowatt hours and purchased 330,100,000 kilowatt hours. During this year it sold to domestic, commercial and unclassified users, 304,800,000 kilowatt hours; to non-affiliated public utility

(433) companies 78,800,000 kilowatt hours; to industrial users 887,200,000 kilowatt hours, and to municipalities 67,900,000 kilowatt hours.

On the basis of the 1932 business, the Duke Power Company ranks sixth among the hydro-electric systems of the United States and the first in the South.

The total capitalization of the Duke Power Company, on December 31, 1933, amounted to $141,288,708 and consisted of $40,000,000 principal amount in bonds, $283,811 par value preferred stock and $101,004,897 par value common stock. The original capitalization of the company amounted to $3,700,500 on May 18, 1917 and had increased to $141,288,000 on December 31, 1933. With the exception of $20,000,000 principal amount of bonds, none of the financing of the Duke Power Company has been done through public offering. All of the securities issued with the exception of the aforementioned amount were subscribed to by James B. Duke and his associates and by employees of the company, or were accepted in exchange for other securities.

The outstanding common stock of the Duke Power Company on March 1, 1933, was held in rather large lots. Stockholders owning 1,000 shares or more accounted for 927,864 shares out of the 1,010,048 shares outstanding. This amounted to 91.8 per cent of the total outstanding. Of the total outstanding, 792,882 shares, or 78.5 per cent, were owned by members of the Duke family, their estates, or trusts created by them. The largest single stockholder was the Duke Endowment which owned 371,076 shares. The second largest stockholder was the Doris Duke Trust which owned 141,488 shares.

What later developed into the Duke power system began with the organization of the Catawba Power Company in 1900. This company was organized by W. Gill Wylie and associates, to build a hydro-electric plant of 6,800 kilowatt capacity, on the Catawba River, near Rock Hill, South Carolina. Doctor Wylie interested James B. Duke and B. N. Duke in this enterprise and the project was successfully completed and placed in operation in March, 1903.

(434) At or about the time Mr. Duke became interested in the development of hydro-electric power, W. S. Lee was engaged as an engineer. From that time, until his death in March, 1934, Mr. Lee served as a vice-president and chief engineer.

After completion of the Catawba Plant, Mr. Duke and associates laid the plans and caused engineering studies to be made, with a view to developing a unified electric system to serve the western sections of North and South Carolina. The Catawba River offered a most suitable site for such a development, but due to meager natural storage, the problem was not a simple one. The river flow was of a widely fluctuating nature ranging from sudden and destructive heavy flow discharges to low discharges due to prolonged droughts. The least expensive method of developing the water powers of the river, would have been to build low-head plants on the most economical sites. This, however, would have utilized only a small portion of the total available power, and was not favored. Instead, Mr. Duke and associates worked on the basis that to truly develop and conserve this natural resource, every foot of available head must be developed, together with storage reservoirs and auxiliary steam plants. This plan was adhered to and the system as it exists today resulted from continuous engineering studies and operating experiences.

In a statement submitted to the Railroad Commission of South Carolina, Mr. Lee stated that the development of hydro-electric power on a large scale during this early period was truly a pioneering enterprise requiring far-sighted vision, faith in the future of the territory and financial courage. He further stated that it was now difficult to realize that in the early days of this system's operations, the development of hydro-electric power and high voltage transmission were still in the experimental stage. Only the largest cities enjoyed the advantage of electric service and in most cases this was furnished by isolated, inadequate and inefficient plants. The few textile mills in the piedmont section at this time were equipped with mechanical drives operated either by steam engines or by hydraulic turbine drives operated from small and wasteful water power developments.

(435) Another major problem confronting the system in the early years was the development of a market for electric power. The textile manufacturers were skeptical about the use of electric power for the manufacture of cotton goods and distrusted the use of transmission lines for the efficient delivery of power. Electrification involved considerable expense as well as the discarding of their existing power plants; therefore, contracts for the sale of power were made with great difficulty. To educate the industry in the use of electric power and to help in the promotion of new industries, James B. Duke contributed not only his time and efforts but he personally subscribed for shares of stock in various manufacturing enterprises, and in many cases after these enterprises became successful he sold the shares back to the organizer at cost.

In this statement Mr. Lee further stated that a very important factor in the history of the system's development was the low cost of its construction. Part of this feature was due to the simplicity and economy of design but a mort important factor was the active interest and financial support of James B. Duke. The latter was in touch with world-wide economic conditions, and being a believer in long time planning, he timed the purchase of equipment and materials and the placing of construction contracts, so as to gain the advantage of low price market conditions. In fact the records indicate that with a few exceptions, all major equipment and construction contracts were placed during depression periods.

During the period that the Catawba Plant was being built, the American Development Company was acquiring other lands and sites on the Catawba River. After the American Development Company completed certain of these acquisitions, these lands and water rights and a demand note of $118,598 together with the capital stocks of C. awba Power Company and $1,096,795 in cash were transferred to Southern Power Company in consideration for the issuance to it of 20,000 shares of preferred stock and 39,990 shares of common stock of the latter. Although the books and records of the American Development Company were not available for examination, it was apparent that the proceeds of the 20,000 shares of

(436) preferred stock were sufficient to approximately cover the cash cost of the assets acquired by Southern Power Company. This is evidenced by the fact that Southern Power Company after charging out the lands and water rights to construction projects, reflected an undistributed balance of $3,617,647, which was later classified as Good-will.

From these facts, it will be observed that the Good-will really amounts to excess par value of securities issued over and above the cost of the lands and water rights acquired.

After the acquisition of these lands and water rights, Southern Power Company built hydro-electric plants on certain of the sites. On March 1, 1910, the Rocky Creek, Ninety-Nine Islands and Great Falls plants were conveyed to a newly organized company named Great Falls Power Company. The apportioned costs of these plants to Southern Power Company amounted to $5,228,145. These plants, lands, water rights and other assets were conveyed to Great Falls Power Company in consideration for the preferred and common stocks of the latter. The plants, together with the lands and water rights received were entered by Great Falls Power Company at a ledger value of $10,360,719, or at a write-up of $5,132,574 in excess of the cost of Southern Power Company. Both companies involved were controlled by the same interests.

On March 1, 1910, Southern Power Company sold other real estate and water rights and paid $20,000 cash to Wateree Power Company in consideration for $2,500,000 par value of its common stock. The assets acquired by the Wateree Power Company has been carried on the books of the Southern Power Company at a cost of $616,173.66. These assets were set up by Wateree Power Company at a value equal to the par value of the stock issued, or $2,480,000, and at a write-up of the water rights and real estate, in the amount of $1,863,826.34.

After acquiring these lands and water rights, Wateree Power Company proceeded with the construction of the Fishing Creek Plant. When completed, the plant

(437) was sold to Wateree Electric Company (now Duke Power Company) at cost, as shown by Wateree Power Company's books. The latter owned the plant until December 15, 1922, at which time it was transferred to a newly organized company called Fishing Creek Power Company. The depreciated ledger value of the plant at the date of transfer amounted to $1,500,155.36 and was set up by the new company at $3,167,318.30, or at a write-up of $1,667,162.94. The write-up was made to provide for the excess par value of common stock issued to Wateree Electric Company over and above the cost to that company.

As of August 31, 1925, the Fishing Creek Power Company was dissolved and the plant was again owned by Wateree Power Company. The plant was owned by the latter company until 1927, when it was taken over by Duke Power Company along with the other plants of Wateree Power Company. An additional write-up of the Fishing Creek Plant was made at August 31, 1925 by Wateree Power Company to equal the par value of the stock issued and amounted to $1,190,593.87. Thus the total write-up in the Fishing Creek Plant by all the companies owning the plant was $2,857,756.81.

As of August 31, 1923, the various companies of the Duke power system caused an appraisal to be made of their physical properties. Two appraisals were made; one by J. E. Sirrine and Company, of Greenville, South Carolina, and the other by W. S. Lee, consulting engineer, of Charlotte, North Carolina. Mr. Lee was also a vice-president and chief engineer of these companies.

After the appraisals had been completed, the individual companies took the average of the appraisal depreciated value as representing the fair value of the property on the appraisal date. The depreciation reserves set up on the properties were cancelled and the properties were recorded on the books of the companies at the appraised value. The total write-up resulting from the appraisal of the properties amounted to $20,320,334.34. As previously stated, Duke Power Company took over the operating property of the system companies. The properties were recorded by the Duke Power

(438) Company at their ledger value; therefore, all write-ups made by the system companies are now reflected on the books of the Duke Power Company.

The write-up through the appraisal of the properties and other write-ups previously enumerated amounted to $30,689,577.82, as of August 31, 1923. This total write-up has been adjusted at various times to provide for the elimination of write-up on properties retired. When property is retired, surplus is charged with the amount of write-up eliminated. Allowing for these adjustments, it was found that there remained in the fixed capital accounts of the Duke Power Company a total write-up of $29,667,135.60 as of December 31, 1933. Although it is a fact that the properties were appraised and written up, yet it must be noted that the increase in ledger value was not employed as a basis for issuing and selling securities to the public.

The surplus created from writing up the properties was employed as a basis for issuing stock dividends. Duke Power Company, as the principal stockholder of the underlying companies, therefore received the majority of these stock dividends. The stock dividends received were valued at par or issue value and recorded as surplus of Duke Power Company. Duke Power Company then in turn issued stock dividends of its own from the surplus so created. Duke Power Company also created other surplus from the valuation of investments in certain stocks. These stocks had been acquired at less than par value thereof and were written up to equal the par value.

The total stock dividends issued by Duke Power Company amounted to $53,502,406.20 in par value. Of the total surplus from which these stock dividends were paid; $32,931,739.41 was created from the valuation of stock dividends received by Duke Power Company from subsidiary companies, from intercompany profits on exchange of securities, and from writing up securities to equal the par value thereof. The surplus from which the subsidiaries declared the stock dividends was largely created by writing up the fixed assets of those companies based on appraisals as of August 31, 1923, and this write-up on all companies amounted to $20,335,334.34.

(439) The principal income of the company has been derived from the sale of electric energy at wholesale rates to non-affiliated utilities, municipalities, industries and its affiliated distributing companies. Other income was received in the form of interest and dividends. Each dollar of gross revenue received by Duke Power Company during the six-year period from January 1, 1928 to December 31, 1933, was utilized for the following purposes: operating expenses 28.48 cents, provision for depreciation 18.63 cents, provision for state, county and municipal taxes 9.26 cents, Federal income tax 3.72 cents, bond interest 10.84 cents, amortization of bond discount, .35 cents, leaving 28.72 cents of each dollar of gross revenue for the stockholders. Of the latter amount 26.37 cents was distributed in cash to the common stockholders, .11 cents in cash to the preferred stockholders and 2.24 cents was added to surplus.

During the period from August, 1927 to February 1930, considerable income was realized in the form of interest on call loans placed in the New York market through various New York banks. Some of these loans were placed for the account of the Duke Endowment, The Doris Duke Trust, Piedmont and Northern Railway Company and Durham and Southern Railway Company. For loans placed for these interests, the same amount of interest was paid as that received. The maximum amount of loans placed by the Duke Power Company for its own account and the other parties named, amounted to $14,400,000, as of January 31, 1928. The loans decreased during 1928 and until June, 1929, when they again reached considerable proportions, and amounted to $13,900,000 in September 1929. From this point they receded again, and were finally closed out in May, 1930.

The adequacy of the provision for depreciation is indicated by the fact that the provision exceeded the allowance by the Internal Revenue Department, for Federal income tax purposes, by more than a million dollars, per year during the years 1930 to 1933, inclusive. The company contended that its provision is justified in order to build up an ample reserve to provide: (1) the replacing of any portion of the property, the useful life of which has been terminated by physical deterioration, wear and tear, or accidental causes, (2) the replacing of

(440) inefficient and inadequate portions of the property to increase the safety, the reliability, and efficiency of the service, (3) the safeguarding of the integrity of the investment in the property against its eventual partial or total retirement as it becomes obsolete, inadequate, and no longer used or useful.

For the purpose of this report, rates of profit were computed on the corporate capital employed as shown by the company's books and as adjusted by the Commission's examiner after deduction of write-ups, intercompany profits and non-utility investments. The rates of profit for the years 1928 to 1933, inclusive were computed by the examiner, and the basis and method of calculations are shown by schedules contained in the report. The rates of profit for the years 1925, 1926, 1927 and 1934 were computed by the company on the same basis as employed by the Commission's examiner. The rates for these years, as determined by the company are shown but the schedules are not included in the report.

The annual rates of profit on the corporate capital employed, computed as described and on the basis of net income, both before and after deductions from income for the payment of Federal income tax, for the years 1925 to 1934, inclusive, were as follows:

Before Deduction for Federal Income Tax

Year	Per Books Return on Corporate Capital Employed (Per cent)	As Adjusted Return on Corporate Capital Employed (Per cent)
1925	3.50	5.82
1926	4.05	6.45
1927	5.56	8.09
1928	6.74	9.27
1929	6.53	9.13
1930	5.01	6.90
1931	4.61	6.19
1932	4.06	5.47
1933	4.40	5.96
1934	3.44	4.65

(441)

After Deduction for Federal Income Tax

Year	Per Books Return on Corporate Capital Employed (Per cent)	As Adjusted Return on Corporate Capital Employed (Per cent)
1925	3.11	5.17
1926	3.61	5.74
1927	4.93	7.17
1928	6.14	8.44
1929	5.99	8.37
1930	4.53	6.24
1931	4.28	5.75
1932	3.69	4.98
1933	4.01	5.43
1934	3.14	4.25

Rate of Profit on Common Stock Equity—Duke Power Company. The annual rates of profit earned on the common stock equity investment, calculated on the above described bases, were as follows:

Before Deduction for Federal Income Tax

Year	Per Books Return on the common stock equity (Per cent)	As Adjusted Return on the common stock equity (Per cent)
1925	3.33	5.92
1926	3.96	6.62
1927	6.66	11.13
1928	7.66	12.74
1929	7.23	12.24
1930	5.15	8.28
1931	4.51	6.88
1932	3.76	5.79
1933	4.24	6.57
1934	2.93	4.53

(442) After Deduction for Federal Income Tax

Year	Per Books Return on the common stock equity (Per cent)	As Adjusted Return on the common stock equity (Per cent)
1925	2.91	5.17
1926	3.48	5.81
1927	5.85	9.78
1928	6.70	11.22
1929	6.46	10.92
1930	4.48	7.21
1931	4.07	6.21
1932	3.27	5.03
1933	3.71	5.75
1934	2.53	3.91

Rate of Profit on Depreciated Fixed Capital—Duke Power Company. The annual rates of profit earned on the depreciated fixed capital were calculated on the same basis as that described under corporate capital employed. In addition, from the fixed capital, as adjusted by the Commission's examiner, there has been deducted the entire reserve for depreciation as recorded by the company. The basis on which these rates have been computed do not contain any allowance in the fixed capital for working capital. The resultant depreciated fixed capital as here computed is not intended to reflect a rate base, but is shown merely for purposes of comparison with return on corporate capital employed. Therefore, the rates of profit shown here do not contain all the elements included in a rate base, and the rates should not be construed to be the rates earned on the rate base determined by State regulatory bodies.

The rates of profit on the depreciated fixed capital, as per the company's books and before deductions from income for the payment of Federal income tax, were: 3.68 per cent, 1925; 4.05 per cent, 1926; 6.83 per cent, 1927; 8.43 per cent, 1928; 8.13 per cent, 1929; 5.93 per cent, 1930; 5.35 per cent, 1931; 4.49 per cent, 1932; 5.19 per cent, 1933; 3.81 per cent, 1934.

(443) The rates of profit on the depreciated fixed capital as adjusted by the Commission's examiner and before deductions from income for the payment of Federal income tax, were: 6.02 per cent, 1925; 6.31 per cent, 1926; 10.29 per cent, 1927; 12.57 per cent, 1928; 12.59 per cent, 1929; 9.08 per cent, 1930; 7.94 per cent, 1931; 6.62 per cent, 1932; 7.72 per cent, 1933; 5.75 per cent, 1934.

The rates of profit on the depreciated fixed capital as per the company's books and after deductions from income for the payment of Federal income tax, were: 3.25 per cent, 1925; 3.54 per cent, 1926; 6.01 per cent, 1927; 7.54 per cent, 1928; 7.34 per cent, 1929; 5.21 per cent, 1930; 4.87 per cent, 1931; 3.95 per cent, 1932; 4.61 per cent, 1933; 3.36 per cent, 1934.

The rates of profit on the depreciated fixed capital as adjusted by the Commission's examiner and after deductions from income for the payment of Federal income tax, were: 5.30 per cent, 1925; 5.51 per cent, 1926; 9.06 per cent, 1927; 11.25 per cent, 1928; 11.35 per cent, 1929; 7.98 per cent, 1930; 7.13 per cent, 1931; 5.82 per cent, 1932; 6.85 per cent, 1933; 5.06 per cent, 1934.

The decrease in earnings, and therefore rate of profit, was influenced by rate reductions and by loss of revenue due to general business conditions. The following reductions in rates have been made since 1928 and the estimated annual cost to Duke Power Company, based on previous years' sales was as follows:

Effective Date	Annual cost
December 1, 1928	$ 519,400.00
November 1, 1932	642,600.00
May 1, 1933	418,100.00
Sept. 1, 1934	725,000.00
March 1, 1935	206,800.00
Total	$2,511,900.00

The company officials stated that the above reductions were voluntary on the part of the company, except the one of September 1, 1934, which was based on a proposal

(444) by the company and agreed to by the Commission after a rate investigation had been conducted. In this connection, it should be noted that the effect of the last two reductions and part of the reduction of May 1, 1933, was not reflected in the sales covered by this report, which covered the period to December 31, 1933.

Rate of Profit on Corporate Capital—Duke Power Company (Consolidated)—As stated, Duke Power Company engaged principally in the generation, transmission and sale of electric energy at wholesale rates. Through subsidiaries, the common stock of which was entirely owned, it distributed electric current at retail rates to customers in various communities located in the States of North and South Carolina. The power distributed by the subsidiaries was obtained largely from Duke Power Company at an intercompany price which was the same as that obtained for power sold to non-affiliated distributors of a similar type. Because of this intercompany sale of power involving intercompany profits, the two operations have been consolidated for the purpose of this report; and all intercompany transactions eliminated.

Rates of profit were computed on the consolidated corporate capital employed as shown by the company's books and after deduction of write-ups, intercompany profits and non-utility investments, as determined by the Commission's examiner.

The rates of profit for the years 1928 to 1933, inclusive, were computed by the examiner, and the bases are shown by schedules contained in the report. The rates of profit for the years 1925, 1926, 1927 and 1934, were computed by the company on the same basis as employed by the Commission's examiner. The rates for these years, as determined by the company, are shown, but the schedules are not included in the report.

The annual rates of profit computed on these bases, and on the basis of net income, both before and after deductions for the payment of Federal income tax, for the years 1925 to 1934, inclusive, were as follows:

(445)

Before Deductions for Federal Income Tax

Year	Per Books Return on Consolidated Corporate Capital Employed (per cent)	As Adjusted Return on Consolidated Corporate Capital Employed (per cent)
1925	4.69	7.85
1926	4.62	7.64
1927	6.11	9.22
1928	7.50	10.50
1929	7.36	10.35
1930	5.64	7.77
1931	5.07	6.83
1932	4.33	5.86
1933	4.49	6.09
1934	3.78	5.14

After Deductions for Federal Income Tax

Year	Per Books Return on Consolidated Corporate Capital Employed (per cent)	As Adjusted Return on Consolidated Corporate Capital Employed (per cent)
1925	4.07	6.80
1926	4.09	6.77
1927	5.36	8.09
1928	6.86	9.60
1929	6.78	9.53
1930	5.10	7.03
1931	4.68	6.31
1932	3.92	5.30
1933	4.09	5.55
1934	3.45	4.70

Rate of Profit on Common Stock Equity—Duke Power Company, Consolidated. The annual rates of profit earned on the common stock equity investment, calculated on the above described bases, were as follows:

Before Deductions for Federal Income Tax

(446)

Year	Per Books Return on the Consolidated Common Stock Equity (per cent)	As Adjusted Return on the Consolidated Common Stock Equity (per cent)
1925	4.58	8.85
1926	4.50	8.47
1927	7.42	13.87
1928	8.96	16.67
1929	8.73	16.32
1930	6.04	10.66
1931	5.05	8.38
1932	3.91	6.55
1933	4.17	7.03
1934	3.11	5.24

After Deductions for Federal Income Tax

Year	Per Books Return on the Consolidated Common Stock Equity (per cent)	As Adjusted Return on the Consolidated Common Stock Equity (per cent)
1925	3.83	7.40
1926	3.87	7.29
1927	6.38	11.94
1928	7.92	14.74
1929	7.80	14.59
1930	5.19	9.16
1931	4.45	7.39
1932	3.27	5.48
1933	3.55	5.99
1934	2.60	4.38

Rate of Profit on Consolidated Depreciated Fixed Capital—Duke Power Company. The annual rates of profit earned on the consolidated depreciated fixed capital were calculated on the same basis as that described under corporate capital employed. In addition, from the

(447) fixed capital, as adjusted by the Commission's examiner, there has been deducted the entire reserve for depreciation as recorded by the company. The bases on which these rates have been computed do not contain any allowance in the fixed capital for working capital. The resultant consolidated depreciated fixed capital as here computed is not intended to reflect a rate base, but is shown merely for purposes of comparison with return on consolidated capital employed. Therefore, the rates or profit shown here do not contain all the elements included in a rate base, and the rates should not be construed to be the rates earned on the rate base determined by the State regulatory bodies.

The rates of profit on the consolidated depreciated fixed capital, as per the company's books and before deductions from income for the payment of Federal income tax, were: 4.63 per cent, 1925; 4.65 per cent, 1926; 6.83 per cent, 1927; 8.22 per cent, 1928; 8.25 per cent, 1929; 6.38 per cent, 1930; 5.74 per cent, 1931; 4.86 per cent, 1932; 5.06 per cent, 1933; 4.14 per cent, 1934.

The rates of profit on the consolidated depreciated fixed capital as adjusted by the Commission's examiner and before deductions for the payment of Federal income tax, were: 7.62 per cent, 1925; 7.48 per cent, 1926; 10.42 per cent, 1927; 11.78 per cent, 1928; 12.08 per cent, 1929; 9.25 per cent, 1930; 8.06 per cent, 1931; 6.86 per cent, 1932; 7.18 per cent, 1933; 5.93 per cent, 1934.

The rates of profit on the consolidated depreciated fixed capital as per the company's books and after deductions from income for the payment of Federal income tax, were: 3.97 per cent, 1925; 4.11 per cent, 1926; 6.02 per cent, 1927; 7.51 per cent, 1928; 7.59 per cent, 1929; 5.75 per cent, 1930; 5.28 per cent, 1931; 4.37 per cent, 1932; 4.59 per cent, 1933; 3.74 per cent, 1934.

The rates of profit on the consolidated depreciated fixed capital as adjusted by the Commission's examiner and after deductions from income for the payment of Federal income tax, were: 6.54 per cent, 1925; 6.62 per cent, 1926; 9.19 per cent, 1927; 10.75 per cent, 1928; 11.13 per cent, 1929; 8.33 per cent, 1930; 7.42 per cent, 1931;

(448) 6.17 per cent, 1932; 6.52 per cent, 1933; 5.37 per cent, 1934.

The decrease in earnings, and therefore, rate of profit, was influenced by rate reductions and by loss of revenue due to general business conditions. The following reductions in rates have been made since 1928 and the estimated annual cost to the system based on previous years' sales was as follows:

Effective Date	Annual cost
December 1, 1928	$ 519,400
November 1, 1932	1,515,500
May 1, 1933	418,100
Sept. 1, 1934	1,335,000
March 1, 1935	118,500
	$3,906,500

The company officials stated that the above reductions were voluntary on the part of the company, except the one of September 1, 1934, which was based on a proposal by the company and agreed to by the Commissions after a rate investigation had been conducted.

In this connection it should be noted that the effect of the last two reductions and part of the reduction of May 1, 1933, was not reflected in the sales covered by this report, which covered the period to December 31, 1933.

DEFENDANTS' EXHIBIT 48.

Defendants introduced in evidence as their Exhibit 48 Report of Federal Trade Commission on Southern Public Utilities Company (subsidiary of Duke Power Company), the summary of said report, as given therein, being as follows:

SUMMARY OF REPORT ON

SOUTHERN PUBLIC UTILITIES COMPANY

This report covers the growth and operations of

(449) Southern Public Utilities Company from its organization in 1913 to December 31, 1933.

Southern Public Utilities Company is controlled by Duke Power Company and is the retail distributing company of the Duke Power System. The company operates in both North Carolina and South Carolina in what is known as the Piedmont Section. At the end of 1933, the company furnished electric service in 195 communities in 31 counties in North Carolina and 84 communities in 13 counties of South Carolina. In addition, gas service was furnished in 10 communities in both states, 3 communities were furnished with water service, and transportation service was furnished in 8 communities.

Southern Public Utilities Company operates 20 small hydro-electric generating stations with a total installed capacity of 25,057 kilowatts. One of the plants, the Gregg Shoals Plant, is leased from Georgia Power Company, an operating subsidiary of Commonwealth & Southern Corporation. In addition, the company owns a large hydro-electric generating plant on the Catawba River near Charlotte, North Carolina, which plant is leased to Duke Power Company for operation. This plant, designated as Mountain Island Station, has an installed capacity of 60,000 kilowatts.

Southern Public Utilities Company owned the transmission system connecting its various generating plants with the territory served, but otherwise the transmission lines supplying the distribution systems of the company were largely owned by Duke Power Company. The major portion of the company's electrical requirements are purchased from Duke Power Company, largely under the latter's established rate schedules.

At the end of 1933, Southern Public Utilities Company had 97,052 electric customers in North Carolina and 30,576 electric customers in South Carolina, or a total of 127,628 electric customers in both states.

Southern Public Utilities Company manufacturers and supplies coal, water, or butane gas in 7 communities in North Carolina and 3 communities in South Carolina. The company has 526 miles of gas mains, gas manufacturing plants with a total daily capacity of 6,706 M. C. F. and gas holders with a total capacity of 2,517 M. C. F.

(450) The fixed capital of Southern Public Utilities Company as recorded at organization, July 1, 1913, amounted to $6,889,478. It stood at $53,529,958 as of December 31, 1933, an increase of $46,640,480 during the intervening twenty-year period since organization. Purchases of property accounted for $34,880,222 of the increase and the remaining $11,760,258 represented new construction less retirements.

Southern Public Utilities Company on July 1, 1913 issued $3,500,000 par value of common stock, $1,750,000 principal amount of bonds, and assumed $1,789,500 principal amount of underlying bonds making its total outstanding capital liability $7,039,000. By the end of 1933 the total outstanding capital liability had increased to $42,719,700 as shown by the following:

	Outstanding		
Security	July 1, 1913	Dec. 31, 1933	Increase
Common Stock	$3,500,000	$21,000,000	$17,500,000
Bonds	1,750,000	16,487,000	14,737,000
Underlying Bonds	1,789,000	5,232,100	3,443,100
Totals	$7,039,000	$42,719,100	$35,680,100

The bonds were issued or assumed in connection with acquisition of utility properties by Southern Public Utilities Company. A majority of the common stock was issued in the same connection although $6,000,000 par value was issued as stock dividends.

The following table shows the comparative growth of the fixed capital and capital liabilities of Southern Public Utilities Company at intervals from July 1, 1913 to December 31, 1933:

Date	Fixed Capital	Capital Liabilities
July 1, 1913	$ 6,889,478	$ 7,039,000
June 30, 1915	10,698,453	9,983,000
June 30, 1920	14,134,523	12,110,500
June 30, 1925	22,906,701	20,704,500
June 30, 1930	37,558,137	38,542,000
Dec. 31, 1933	53,529,958	42,719,100

(451) With the growth of the fixed capital investment of Southern Public Utilities Company, there was a corresponding growth in gross operating revenues from $1,182,519 for the 12 months ended June 30, 1914 to $12,718,089 for the year ended December 31, 1933, an increase of $11,535,570. In the same manner the net operating income increased from $414,932 for the 12 months ended June 30, 1914, to $2,282,030 for the year ended December 31, 1933. Likewise net corporate income available for dividends on common stocks increased from $224,275 to $963,092 for the same fiscal years.

Southern Public Utilities Company was incorporated under the laws of the State of Maine, on March 8, 1913. It was organized by the Duke interests, J. B. Duke, B. N. Duke and their associates, to acquire the properties of various public utility operating companies controlled by Southern Power Company and J. B. Duke. Southern Power Company also was controlled by the Duke interests. The properties were acquired through an intermediary and in payment, Southern Public Utilities Company issued $1,750,000 principal amount 5% first refunding mortgage bonds and $3,500,000 par value common stock, and assumed $1,789,000 principal amount underlying bonds, an aggregate consideration of $7,039,000. The bonds and stock issued by Southern Public Utilities Company were offered to the stockholders of Southern Power Company on the basis of $1,000 face value in bonds and $2,000 par value common stock for $1,210, or $2,117,500 for the total $1,750,000 principal amount bonds and $3,500,000 par value common stock. The proceeds were used to reimburse Southern Power Company and J. B. Duke for the properties transferred to Southern Public Utilities Company.

The properties acquired were set up at values reflecting the total par or face value of the stock and bonds issued in payment. Consequently, the recorded value of the properties included capitalized stock and bond discount amounting to 3,132,500. Since the cash proceeds of the stock and bonds represented the actual cost of the properties, the capitalized discount also represented a write-up of the fixed capital acquired by Southern Public Utilities Company. In addition to capitalized discount, the recorded value of the properties acquired reflected

(452) profits amounting to $512,016 recorded by Southern Power Company and Catawba Power Company in the transfer of the properties. This increased the write-up in the fixed capital acquired at organization by Southern Public Utilities Company to $3,644,516.

However, the write-up would be reduced by the undistributed earnings, if any, of the properties during the period of control by Southern Power Company, which amount was not available.

In 1914, Southern Public Utilities Company purchased certain street railway properties through an intermediary for an aggregate cost of $3,000,000. In payment the company issued $1,500,000 principal amount 5 per cent first and refunding bonds and $1,500,000 par value common stock. The bonds were issued to Southern Power Company in payment for the railway property acquired from that company. The latter sold the bonds at 91 per cent of face value, or at a discount of $135,000, and recorded in addition, a profit of $216,794. The total discount and profit amounting to $351,794 was reflected in the recorded value of the railway properties acquired by Southern Pacific Utilities Company. The common stock issued was offered to the stockholders of Southern Public Utilities Company at $25 per share, or an aggregate discount of $1,125,000. Likewise, this stock discount was reflected in the recorded value of the railway properties. Consequently, the recorded value of the railway properties acquired reflected a write-up of $1,458,364, after deducting a small subsequent adjustment, as a result of the capitalized profits to affiliated interests and stock and bond discounts.

Southern Public Utilities Company, as of January 1, 1917, merged its subsidiary, Greenville-Carolina Power Company. The transaction was effected through sale of the investment in that company consisting of common and preferred stocks to an intermediary and purchase from the latter of the property and other assets of Greenville-Carolina Power Company. In consideration for the property acquired, Southern Public Utilities Company issued $1,000,000 par value of common stock and $286,000 principal amount of bonds, in addition to assuming the

(453) outstanding funded debt of $274,000 principal amount. The stock and bonds issued were sold at a discount of $925,740 for cash, which was used to retire the outstanding preferred stock of Greenville-Carolina Power Company. The stock and bond discount was capitalized on the books of Southern Public Utilities Company and reflected in the recorded value of the property acquired.

In 1923, Southern Public Utilities Company purchased a hydroelectric generating station known as the Mountain Island Plant, from Catawba Manufacturing and Electric Power Company, which was controlled by the Duke interests. In consideration for the plant, the company paid $4,300,000 in cash and issued $2,000,000 par value common stock. The actual construction cost of the plant was $5,257,079. The stock issued in part payment was offered to the stockholders of Southern Public Utilities Company at $50 per share, or total cash proceeds of $1,000,000. The discount, which likewise amounted to $1,000,000, was capitalized in the recorded cost of the plant on the books of Southern Public Utilities Company.

In 1927, Southern Public Utilities Company purchased through Wateree Power Company, another Duke company, certain properties, certain securities of South Carolina Gas and Electric Company, and the common stock of North Carolina Public Service Company from Broad River Power Company and General Gas and Electric Corporation, both of which were controlled by the Barstow interests. The aggregate consideration was $4,569,309.54, of which $1,407,771.50 was applied to the securities of South Carolina Gas and Electric Company, $1,164,119.84 was applied to the common stock of North Carolina Public Service Company and the remaining $1,997,418.20 was applied to the physical properties and other assets received.

Southern Public Utilities Company subsequently, on December 31, 1928, acquired, the property of South Carolina Gas and Electric Company through a mortgage foreclosure sale. Also, the property of North Carolina Public Service Company was subsequently merged on July 1, 1932.

In addition to the foregoing properties, Southern

(454) Public Utilities Company has acquired numerous other properties from other corporations, individuals and municipalities. The aggregate fixed capital purchase amounted to $41,930,731 which included total write-ups of $7,029,208.00. Eliminating the total write-ups leaves $34,901,523 as the actual cost of the purchased properties. The total write-up represented about 20.1 per cent of the aggregate actual cost.

In connection with the electric distributing systems purchased it might be noted that the company upon acquisition of property changed the existing rates to conform with its own established rate schedules which were generally lower.

Although most of the company's fixed capital was purchased some of it was constructed. Contrary to the usual practices, Southern Public Utilities Company did not charge overheads such as interest and taxes to the cost of new construction.

The company's reserve for renewals and retirements as of December 31, 1933 amounted to $12,216,730. This reserve was provided to take care of all losses sustained upon retirement of property as the result of depreciation, obsolescence, or for any cause whatever. However, as the charges against the reserve were relatively small, it does not appear that the company has used the reserve fully to the extent for which it was intended. Since the reserve amounted to 22.8 per cent of fixed capital as of December 31, 1933, it appears ample for the purposes for which it has been used.

As of December 31, 1933, the capital liabilities of Southern Public Utilities Company consisted of $21,000,000 par value common stock, $16,487,000 principal amount first and refunding mortgage 5% gold bonds, and $7,348,600 principal amount underlying bonds, an aggregate of $44,835,600. However, $2,116,500 principal amount underlying bonds were held in the treasury of the company so that the outstanding underlying bonds amounted to $5,232,100 and the outstanding capital liabilities amounted to $42,719,100.

Southern Public Utilities Company issued $8,000,000

(455) par value common stock in part payment for securities and properties of public utility operating companies, $7,000,000 par value common stock for cash and $6,000,000 par value as stock dividends, or $21,000,000 par value common stock from organization to December 31, 1933. The company issued $3,536,000 principal amount first and refunding mortgage bonds at face value in part payment for properties acquired and $12,951,000 principal amount for $12,194,640, in cash, to reimburse itself for new construction and properties purchased. The discount on the bonds issued for cash was $756,360, all of which except $990 was charged to unamortized debt discount and expense, to be amortized over the life of the bonds. However, in addition, there was an actual cash discount of $335,740 on the bonds issued at face value for properties which discount was capitalized in the recorded values of the properties acquired.

In addition to its own properties Southern Public Utilities Company operates under lease agreement the properties of Salisbury and Spencer Railway Company which it controls. Under the lease agreement, Southern Public Utilities Company receives all of the income and pays all the expenses, including the interest on the bonds outstanding. The investment in the company consists of 3,958 shares of common stock, $175,000 principal amount first mortgage bonds and $261,000 principal amount second mortgage bonds, and is carried at a ledger value of $826,205.

The income of Southern Public Utilities Company was derived principally from its electric operations, although gas, water and transportation operations furnished a substantial portion of the revenue of the company. For the entire period from July 1, 1913, to December 31, 1933, electric operating revenues amounted to $78,104,297, or 65.7 per cent of total operating revenue. During the same period gas operating revenue amounted to $11,643,419, or 9.8 per cent of total revenue. The revenue from water, railway and bus operations during the same period amounted to $19,960,945, or 16.8 per cent of total operating revenue. Rent from lease of electric plant during the same period amounted to $6,742,727, and revenue from merchandising and jobbing amounted to $2,387,549. The total operating revenue

(456) during the period from July 1, 1913 to December 31, 1933 amounted to $118,838,937 and other income amounted to $1,792,647, or total revenue from all sources of $120,631,584.

Operating expenses during the period from July 1, 1913 to December 31, 1933, amounted to $87,923,662, which was 74 per cent of total operating revenue. Interest and other deductions from gross income amounted to $11,752,140, or 9.7 per cent of total revenue for the entire period. After deduction of Federal income taxes amounting to $2,581,266, there remained available for dividends $18,374,516, or 15.3 per cent of total revenue during the entire period from July 1, 1913 to December 31, 1933.

The principal source of revenue from electric operations was from the sale of electric energy to residential and commercial customers. During the 5-year period from July 1, 1928 to June 30, 1933, Southern Public Utilities Company sold 425,39[illegible],820 kilowatt hours to residential and commercial customers for an aggregate revenue of $23,030,763, or an average revenue of 5.41¢ per kilowatt hour. The kilowatt hours sold to residential and commercial customers amounted to 32.19 per cent of the total kilowatt hours sold during the 5-year period, and the revenue therefrom represented 59.34 per cent of the total revenue from electric sales during the same period. Sales to power customers amounted to 810,062,976 kilowatt hours and the revenue received therefrom was $13,207,900, an average revenue of 1.63¢ per kilowatt hour. While the kilowatt hours sold to power customers amounted to 61.29 per cent of the total kilowatt hours sold during the period, the revenue from those sales amounted to only 34.03 per cent of the total revenue from electric sales. Sales on a flat rate basis, sales to other electrical corporations, and sales for municipal street lighting accounts for the remaining sales of electric energy. During the entire period from July 1, 1928 to June 30, 1933, the company sold 1,321,600,268 kilowatt hours and the revenue received amounted to $38,810,431, an average of 2.94¢ per kilowatt hour.

Although Southern Public Utilities Company has some generating capacity, most of its electrical requirements are furnished by Duke Power Company which

(457) likewise owns the transmission lines supplying the power to the multiple distribution systems owned by Southern Utilities Company. This power was purchased principally under the established rate schedules of Duke Power Company. Each distribution system of Southern Public Utilities Company, there being about 97 at the end of 1933, was billed separately for the power purchased on the basis of the demand and amount of energy received by that particular system. There was no single contract covering all power purchased from Duke Power Company for the entire Southern Public Utilities System.

As previously noted, Southern Public Utilities Company leases its Mountain Island Plant to Duke Power Company for operation. The lease agreement provides that Southern Public Utilities Company shall receive as rental 7 mills per kilowatt hour generated in the plant, and that the minimum annual rental shall be on the basis of the generation of 90,000,000 kilowatt hours per year, which would amount to a minimum yearly rental of $630,000.

Sales of gas by Southern Public Utilities Company were to residential and commercial customers. During the 5-year period from July 1, 1928 to June 30, 1933, the company sold 2,767,445 M. C. F. of gas and received therefrom aggregate revenue of $4,543,617, or an average of $1.64 per M. C. F. The company owns and operates its own gas manufacturing plants.

Southern Public Utilities Company has never paid any management or supervision fees to Duke Power Company nor other affiliated company.

Profit and loss—surplus of Southern Public Utilities Company as of December 31, 1933, amounted to $3,005,131.06. This surplus represented net corporate income of $18,374,516.33 during the entire period from organization to December 31, 1933; surplus acquired through merger of subsidiary companies amounted to $1,202,396.45; miscellaneous surplus credits of $11,228.96; less cash and stock dividends on the capital stock of the company of $16,578,587.50, and miscellaneous surplus debits

(458) of $4,423.18. The surplus acquired through merger of subsidiary companies represented the increase in the surplus of the subsidiary between the date of acquisition of control by Southern Public Utilities Company and the date of merger. Dividends on common capital stock were paid in both cash and in stock. The cash dividends up to December 31, 1933, amounted to $10,578,587.50 and the stock dividends amounted to $6,000,000. The dividends paid in stock were charged against profit and loss—surplus and credited to the common stock account, thus capitalizing and reinvesting in the business the earnings declared as stock dividends.

The rates of return on average fixed capital per the company's books and on average fixed capital less the aggregate write-ups of $7,029,208 for the years ended June 30, 1925 to 1933, based on net operating income before deducting Federal income taxes, were as follows:

Year Ended	Rate of Return on Average Fixed Capital Per Books	Rate of Return on Average Fixed Capital Less Write-ups
June 30, 1925	7.76%	11.26%
" 1926	6.71	9.59
" 1927	7.33	10.26
" 1928	8.37	11.33
" 1929	9.22	11.82
" 1930	8.07	9.99
" 1931	6.53	7.99
" 1932	5.34	6.47
" 1933	4.81	5.54

After deducting Federal income taxes from net operating income, the rates of return on average fixed capital per the company's books and on average fixed capital less write-ups were as follows for the years ended June 30, 1925 to 1933:

(459) Rates of Return on Average Fixed Capital

Year Ended	Per Books	Less Write-ups
June 30, 1925	7.07%	10.25%
" 1926	5.95	8.50
" 1927	6.66	9.32
" 1928	7.63	10.32
" 1929	8.56	10.98
" 1930	7.42	9.19
" 1931	5.86	7.17
" 1932	4.80	5.83
" 1933	4.14	4.77

It will be observed that the rates of return generally increased from 1926 to 1929; thereafter gradually decreasing due to reduced revenue principally as a result of the effect of the depression and reduced rates for electric service. The annual cost, as estimated by the company, from reduced rates for electric service made in 1932 and 1934 was as follows:

Reduction effective	Estimated Annual Cost
November 1, 1932	$872,900
September 1, 1934	610,000
Total	$1,482,900

The rates of return on average capital employed, average borrowed and invested capital, and on average capital employed less write-ups for the years ended June 30, 1925 to 1933, based on the income available for interest and dividends before deducting Federal income taxes, were as follows:

Rates of Return on Average Capital Employed

Year Ended	Per Books	Less Write-ups
June 30, 1925	8.53%	12.71%
" 1926	7.55	11.14
" 1927	8.53	12.49
" 1928	9.30	13.47
" 1929	10.57	15.04
" 1930	8.27	10.07
" 1931	6.89	8.36
" 1932	5.88	7.13
" 1933	5.65	6.69

(460) After deducting Federal income taxes from income available for interest and dividends, the rates of return on average capital employed were as follows for the years ended June 30, 1925 to 1933:

Year Ended	Rate of Return on Average Capital Employed as Per Books	Rate of Return on Average Capital Employed Less Write-ups
June 30, 1925	7.79%	11.61%
" 1926	6.73	9.93
" 1927	7.78	11.39
" 1928	8.43	12.20
" 1929	9.68	13.77
" 1930	7.68	9.35
" 1931	6.24	7.57
" 1932	5.34	6.48
" 1933	4.87	5.77

The rates of return on common stock equity, representing the par value of common stock plus profit and loss—surplus, and on common stock equity less the aggregate write-ups of $7,029,208, for the years ended June 30, 1925 to 1933, based on the earnings available for dividends on common stock after deducting Federal income taxes, were as follows:

Year ended—	Rate of Return on Average Common stock Equity per Books.	Rate of Return on Average Common Stock Equity Less Write-ups.
June 30, 1925	9.44%	22.62%
" 1926	7.57	17.38
" 1927	9.38	20.83
" 1928	10.43	22.02
" 1929	12.39	24.39
" 1930	9.45	13.81
" 1931	6.86	9.92
" 1932	5.31	7.65
" 1933	4.16	5.88

As of April 30, 1935, subsequent to the final date of examination, Southern Public Utilities Company was merged by its parent company, Duke Power Company.

(461) The merger of the properties was effected on the basis of the book cost to Duke Power Company which was $4,331,455 in excess of the ledger value as shown by the books of Southern Public Utilities Company which ledger value included aggregate write-ups of $7,029,208 as previously explained.

DEFENDANTS' EXHIBIT 49.

Defendants introduced as their Exhibit 49 a copy of the Application of Greenwood County to the Public Works Administration for a loan and grant of $2,627,197.00, of which the estimate of the cost of said project is given as follows:

Estimate of cost.

(1) Preliminary.			
Engineering		$5,000.00	
Legal		1,500.00	
Clerical		500.00	
			7,000.00
(2) Cost of Land:			
13,200 acres @ $25.00		330,000.00	
Easements		3,320.00	
			333,320.00
(3) Construction Costs:			
	Labor	Material	
8000 acres Clearing reservoir	150,000.00	10,000.00	
1½ Miles access railroad	4,000.00	3,500.00	
610,000 cy. yd. fill in dam @ 38c	90,000.00	141,800.00	
2000 cu. yd. stripping top soil from base of turn @ 50c	500.00	500.00	
500 cu yd. 1" gravel under rip rap @ $3.50	900.00	850.00	
3000 cu. yd. 1 man rip rap on face of turn @ $2.50	5,000.00	2,500.00	

(462) Spillway construction complete	55,000.00	97,944.00	
1 intake tower and gates complete	20,000.00	28,080.00	
Penstocks & surge tanks complete	80,000.00	83,040.00	
Power house structure	85,000.00	85,201.00	
Powerhouse equipment Hydraulic	75,000.00	179,100.00	
Electric equipment complete	100,000.00	395,417.00	
Main transmission lines	20,000.00	40,000.00	
Rural electric lines	40,000.00	60,000.00	
Highways, railroads and higher lines to move	75,000.00	20,570.00	
	800,400.00	1,148,502.00	1,948,902.00
(4) Engineers Fee Add to preliminary			135,875.00
(5) Lake:			
Additional		30,000.00	
Administration		25,000.00	55,000.00
(6) Interest during construction approximate			60,000.00
(7) Miscellaneous:			
Print of bonds		7,500.00	
Advertisement of contract		100.00	
Contingent fee		79,500.00	
Grand Total			2,627,197.00

This application is for the construction of the project as orlginally contemplated, which would have been confined in its operation to Greenwood County, and according to which the powerhouse, etc. would have been located on the Greenwood County side of the Saluda River.

(463) **DEFENDANTS' EXHIBIT 50.**

RESOLUTION FOR SPECIAL BOARD

Subject: Reconsideration of resolution whereby this Board included in the comprehensive program and made an allotment and grant to finance the project of Greenwood County, South Carolina, for the construction of an hydroelectric plant comprising an easthen dam across the Saluda River and other works.

Whereas by resolution dated June 20, 1934, the project for the construction of an hydroelectric plant comprising an earthen dam across the Saluda River and other works, Docket No. 3972 was included in the comprehensive program and the sum of $2,757,00 was allotted for the purpose of aiding its financing by way of loan and grant:

Whereas it appears that the Duke Power Company, a New Jersey corporation engaged in the sale of electric power in the State of South Carolina, has not had an opportunity to be heard in opposition to the said project:

Whereas the Electric Power Board of Review has arranged such hearing on Monday, July 2, at 10 A. M., at the office of said Board:

Resolved that the resolution whereby said project was included in the comprehensive program and allotment made for its financing be now reconsidered and reconsideration having been had that said project be placed on the agenda of this Board for its next meeting.

FCH

Board approved June 20, 1934.
Presidential approval Jun. 27, 1934.

(464) **DEFENDANTS' EXHIBIT #51.**

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

Washington, D. C.

RESOLUTION OF SPECIAL BOARD FOR PUBLIC WORKS

RE: GREENWOOD COUNTY, SOUTH CAROLINA

Resolved that the Administration and the Special Board include in the comprehensive program a project for the construction of a hydro-electric plant comprising an earthen dam across the Saluda River, a 15,000 kw generating station with necessary control equipment and approximately 90 miles of high and low tension distribution lines, by "Greenwood County", South Carolina, substantially in accord with Docket No. 3972, and allot a sum not to exceed $2,767,000, for the purpose of aiding by way of a loan and grant, the financing of such project, subject to the execution of a contract satisfactory to the Administrator, between the United States of America and "Greenwood County".

Board approval 6/20/34

Presidential approval 7/19/34

F. C. H.

DEFENDANTS' EXHIBIT #52.

Legal—LG: in docket 3972

October 29, 1934.

RESOLUTION

Subject: Docket No. 3972, Greenwood County, South Carolina, hydroelectric generating station and transmission lines, additional allotment of $85,000 (total allotment of $2,852,000).

(465) The Electric Power Board of Review having examined the docket and the data therein and having noted that the Finance and Engineering Divisions have approved this additional allotment subject to certain conditions, concurs in the conclusions reached by said divisions and recommends that an additional allotment of $85,000 be made for this project, subject to the conditions set forth in the supplemental reports of the Finance and Engineering Divisions, provided that condition No. 3 in the supplemental report of the Finance Division shall be understood to be as set forth in the attached memorandum to Mr. Schnepfe.

HENRY T. HUNT,
Chairman.

Records Section PWA
Projects Division

Nov. 9, 1934

Received

DEFENDANTS' EXHIBIT #54.

The defendants introduced in evidence as their Exhibit No. 54, copy of the contract dated as of December 8, 1934, between the County of Greenwood, South Carolina, and the United States of America, by Harold L. Ickes, a copy of which said contract is attached to the original answer of the defendant, Harold L. Ickes as Federal Administrator of Public Works, as Exhibit "A", and made a part thereof, and reference is made thereto.

DEFENDANT'S EXHIBIT 55.

SEABOARD AIR LINE RAILWAY COMPANY

Valuation Section 2—South Carolina.

Total reproduction costs, as shown in basic engineering report, of bridge over Saluda River on valuation date, June 30, 1918, with prices as of 1910-1914.

(466) Account 6.

Mile 415.

Bridge 108.9 over Saluda River, consisting of one single track, 200-ft. through truss, steel span on stone piers.

Timber trestle approach on South end	585 ft. long
Timber trestle approach on North end	202 ft. long
Total length of timber trestle	787 ft.

Item	Cond. Per Cent	Cost of Production New	Less Depre.
Substructure—stone piers	80	$12,988	$10,390
Superstructure—steel	64	12,534	8,008
Timber trestle approaches	45	13,378	6,182
Engineering and General Expenditures	65	4,303	2,797
Total Bridge		$44,759	$28,933

Plaintiffs duly objected to the foregoing exhibit on the ground that same is incompetent, irrelevant, immaterial, and is hearsay.

DEFENDANTS' EXHIBIT 56.

ATLANTIC COAST LINE RAILROAD COMPANY
Subsidiary

Subsidary

CHARLESTON & WESTERN CAROLINA RAILROAD COMPANY

Valuation Section 1—South Carolina

Total reproduction costs, as shown in basic engineering report, of bridge over Saluda River on valuation date, June 30, 1915, with prices as of 1910-1914.

Station 4090—16

Bridge over the Saluda River, consisting of two steel through truss spans, single track, on stone piers.

(467) Total length of steel, 255 feet.

Timber trestle approach on East end	249 ft. long
Timber trestle approach on West end	596 ft. long
Total length of timber trestle	845 ft.

Item	Cond. Per Cent	Cost of Reproduction New	Less Depr.
Substructure—stone piers	75	$11,773	$ 8,830
Substructure—steel, two spans	82	16,885	13,837
Timber trestle approaches	65	11,051	7,183
Engineering and general Expenditures	76	4,391	3,337
Total bridge		$45,688	$34,775

Plaintiffs duly objected to the foregoing exhibit on the ground that same is incompetent, irrelevant, immaterial, and is hearsay.

DEFENDANTS' EX. 57.

This exhibit is a copy of the Minutes of a hearing given the Duke Power Company before the Public Works Administration July 2, 1934. The original Exhibit is being forwarded to the Circuit Court of Appeals.

DEFENDANTS' EXHIBIT #58.

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

State Engineer

Box 780
Columbia, S. C.

Mr. D. W. Robinson, Jr.,
Attorney at Law,
Columbia, S. C.

Dear Sir:

I hand you herewith a list of approved projects of

(468) the Public Works Administration since this office was organized in August, 1933, 19 of which have been completed and 35 of which are now under construction:

(Copy list)

Applicant	Type of Project	Amount
City of Columbia	Water & Sewer Extension	$893,000
Parker Dist., Greenville	Sewer Extension	415,000
Augusta Road, "	Sewer Extension	205,000
McLeod Infirmary, Florence	Hospital	300,000
City of Greenwood	Waterworks extension	200,000
Town of Hartville	Water & Sewer Extensions	73,000
City of Greenwood	Sewer Extensions	47,000
Town of Cameron	Waterworks	33,000
Sumter	Water & Sewer Exten.	108,000
Georgetown County	Toll Bridge	760,000
Georgetown (Town)	Well	10,000
Fort Mill	Sewer Extensions	89,000
Anderson	Street Paving	101,000
Calhoun Falls	Waterworks & Sewer	72,000
Central	Waterworks	62,000
Hampton	Waterworks	40,000
Olympia School, Columbia	School Bldg. (Grant)	2,700
Jefferson	Waterworks	26,000
Williamston	Water & Sewer	135,000
Holly Hill	Waterworks	31,500
Summerton	"	37,000
Prosperity	"	40,000
Lynchburg	"	31,000
Mount Pleasant	"	75,000
Society Hill	"	24,000
Rock Hill	Sewer System	263,000
Irmo School Dist. #45 Lexington County	School Bldg.	120,000
City of Blackville	Waterworks	45,000
Woofruff School Dist. #33, Spartanburg City	School Bldg.	34,000

(469)

Applicant	Type of Project	Amount
Aiken County	Hospital	158,000
Barnwell High School District	School Bldg.	50,000
xNewberry County-	Paving (transferred to Bureau of Public Roads)	98,000
Town of Pinewood	Waterworks	23,000
Rock Hill School Dist. #12, York County	School Bldg.	128,000
Town of Whitmire	Paving	9,000
Ridgeville School Dist. #12, Dorchester County	School Bldg.	28,000
Fairforest School Dist. #2, Spartanburg County	,, ,,	30,000
Town of Pendleton	Waterworks	52,000
Iva School Dist. #44 Anderson County	School Bldg.	55,500
Town of Hartville	Sewer Extension	41,000
State of South Carolina-Memorial Commission, Columbia	Memorial Bldg. (Grant)	33,200
Greenwood County	Hydro-Electric	2,852,000
Florence County	Court House	118,900
Town of Clinton	Water & Sewer Extension	78,000
Township of Hartsville	Community Center	125,000
Town of Bethune	Water	26,000
Town of Loris	,,	31,000
City of Spartanburg	,,	25,000
Town of Pageland	Water & Sewer	49,000
Timmonsville School District #16	School Bldg.	12,000
Batesburg	Water Extension	95,000
S. C. State Institutions	Buildings	976,000

(470)

Applicant	Type of Project	Amount
Town of Mayesville	Waterworks	24,000
Town of Varnville	"	27,000
Town of Pamplico	"	28,000
City of Columbia	Market Shed	42,000
City of Bamberg	Sewer System & Disposal plant	100,000
City of Bishopville	School Bldg.	80,800
*City of Greenville	Hospital (rescinded)	140,000
*City of Bennettsville	Library Bldg. (Grant)	800
*Town of Honea Path	Paving & Sewer	26,300
*Town of Honea Path	Waterworks & Pool	10,000

*Note: Rescinded by applicant.

Yours very truly,

(S) J. L. M. IRBY,
Acting State Director, PWA.

DEFENDANTS' EXHIBIT #61.

EXECUTIVE ORDER

Administration of Public Works.

Pursuant to the authority of AN ACT To encourage National Industrial Recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes", approved June 16, 1933, and in order to effectuate title II—Public Works and Construction Projects—thereof;

I hereby appoint Harold L. Ickes to exercise the office of Federal Emergency Administrator of Public Works.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
July 8, 1933.

(No. 6198)

(471) **DEFENDANTS' EXHIBIT #62.**

EXECUTIVE ORDER

DELEGATING CERTAIN FUNCTIONS AND POWER TO THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS.

By virtue of and pursuant to the authority vested in me by section 201(a) of the National Industrial Recovery Act, approved June 16, 1933, 48 Stat. 195 (hereinafter referred to as the "Act"), I hereby delegate to the Federal Emergency Administrator of Public Works the following functions and powers:

1. In his discretion, and upon such terms and conditions as he may prescribe, to sell, assign, transfer, and deliver all securities or any part thereof purchased under the authority of section 203 of the said Act and of Title II of the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934, Stat. 1021, and to apply the proceeds as prescribed by section 203 of the said Act and said Emergency Appropriation Act, fiscal year 1935.

2. To alter, amend, or waive any or all rules and regulations set forth in Executive Order No. 6252 of August 19, 1933, and any other rule or regulation promulgated by the President under the authority of section 209 of said Act, and to prescribe pursuant to the authority of the said section 209 any other rules or regulations as are necessary to carry out the purposes of said Act; Provided, however, no rule or regulation of the violation of which is made punishable by fine or imprisonment under the said section 209 shall become effective until approved by me.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
December 26, 1934.

(No. 6929)

(472) **DEFENDANTS' EXHIBIT #66.**

PRIMARY POWER CONTRACT

Schedule No. 10, Class 1.

MEMORANDUM OF AGREEMENT, made and entered into this 27th day of March, 1935, by and between Southern Public Utilities Company, a corporation organized and existing under the laws of the State of Maine, party of the first part, hereinafter designated as and called the "Power Company", and Commissioners of Public Works of the City of Laurens and the City of Laurens, a municipal corporation organized and existing under the laws of the State of South Carolina, party of the second part, hereinafter designed as and called the "consumer", WITNESSETH: *******

FIRST: The Power Company agrees that it will deliver to the Consumer electric power, and the Consumer agrees to receive, use, and pay for said electric power, at the time and place or places, and for the purposes, and in the amount, and in the manner, and in accordance with the terms, limitations, and conditions hereinafter set forth for and during, and this contract shall continue in force for the term of one year from the date or day on which the delivering of electric power hereunder is and shall be actually begun; and thereafter it shall continue in force from year to year, provided, however, that the parties hereto, or either of them, can terminate the same at the end of the original term of one year, or at the end of any year thereafter by giving at least sixty (60) days' previous notice of such termination in writing.

SECOND: The electric power to be supplied hereunder shall be three-phase, alternating, at approximately sixty (60) cycles per second periodicity, and of a voltage to be determined upon, from time to time, by the Power Company at approximately Two Thousand, Three Hundred (2,300) volts. Said electric power shall be delivered and supplied by the Power Company to the Consumer at a terminal or delivery point located in the State of South Carolina, County of Laurens, at or near Laurens, and more particularly located and established, to-wit: At the disconnecting switches of the Power Company located at the outdoor substation of the Power

(473) Company at the site of the old steam power plant in Laurens.

All meters used for measuring said electric power hereunder shall be located at the above delivery point.

THIRD: The maximum amount of electric power which the Power Company shall be required to deliver under this contract is and shall not be in excess of 600 kilowatt, which amount shall be known as the contract demand. If and when the requirements of the consumer become greater than this contract demand, then if the Power Company has additional power, this contract demand may be increased by such additional amount as the parties may agree upon.

The Consumer expressly agrees that it will pay for all electric power received and used by it each month under this contract at the following scale of rates:

Schedule No. 10.

Demand Charge	Kilowatts Billing Demand	Per Kilowatt
First	300	$1.15
Next	700	1.00
All Over	1,000	.90
PLUS AN		
Energy Charge:	Kilowatt Hours Per Month	Per Kilowatt Hour
First	50,000	.82 cents
Next	150,000	.80 cents
Next	200,000	.75 cents
All Over	400,000	.70 cents

Bills shall be rendered each month by the Power Company to the Consumer for the electric power delivered during the preceding month, and all such bills shall be payable at the office of the Power Company at Charlotte, North Carolina, on or before the 5th day of the calendar month immediately succeeding the month in which said electric power shall have been delivered.

• • • • • • • •

(474) SIXTH: The electric power delivered hereunder is and shall be delivered for the purpose of its being used by the Consumer for lighting the streets and the public and private buildings and for furnishing electricity for lighting, heating and motive power to the inhabitants of the City of Laurens, South Carolina, and for other municipal purposes at said City of Laurens, and the Consumer is not permitted to, and hereby agrees not to, us or apply said electric power delivered hereunder, or any part thereof, in any place or places, or in any manner, or for any purposes, other than are provided for in this contact.

* * * * * * * *

EIGHTH: All of such electric power which shall be leased, sublet or otherwise disposed of by the Consumer to any person, firm, or corporation shall be leased, sublet, or disposed of under contract, each of which contracts shall be subject to this contract.

DEFENDANTS' EXHIBIT #67.

Contrrct between Duke Power Company and the City of Newberry, dated February 12, 1935, similar to Exhibit 66.

WHEREFORE, the parties agree upon the above and foregoing statement of evidence as a true, full, correct and complete statement of all the material evidence taken and given on the trial of this cause.

This Septmber 27, 1935.

HENRY T. HUNT,
W. H. NICHOLSON,
R. F. DAVIS,
D. W. ROBINSON, JR.,
Attorneys for Defendants-Appellants.

H. J. HAYNSWORTH,
W. R. PERKINS,
J. H. MARION,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs-Appellees.

(475) IT IS ORDERED: That the foregoing Statement of Evidence, consisting of four parts and three hundred and seventy-one pages, exclusive of certain exhibits and certain additions to the Testimony, be, and the same is, hereby approved.

(signed) H. H. WATKINS,
United States District Judge.

Greenville, S. C.

October 1, 1935.

DEFENDANT'S MOTION TO STRIKE OUT CERTAIN TESTIMONY.

Filed July 19, 1935

Mr. D. W. Robinson, Jr.: Your Honor, I move to strike out the testimony offered by plaintiffs dealing with the question of the cost of the project, the design and safety features of the dam, the operation of revenues and expenses, and the question of whether the loan will be adequately secured, and the project self-liquidating.

The Court: Now that presents to the Court a different question than what was in the original motion, because the original motion admitted the allegations of the bill upon those points.

Mr. D. W. Robinson, Jr.: Now, if your Honor would prefer us to argue that with the main features,—

The Court: I was just going to suggest, Mr. Robinson, that it might be well to argue all the questions together, because, without having ample time to study the testimony, I have reviewed it,—I may say, hurriedly,—and I understand from Mr. Walters that all the testimony is completed but that of two or three witnesses.

Mr. D. W. Robinson, Jr. requests ruling on motion.

The Court: On that point, Mr. Robinson, my present view is this: that in the making up of those estimates,

(476) where there is substantial evidence at all to support the finding of the Administration, the Court ought not to interfere with it; that there is a large discretion in those matters, and that the Court certainly would not interfere with the exercise of a discretion that is not unreasonable.

Mr. D. W. Robinson, Jr.: Now, if your Honor please, we also interposed objections, and wish to renew them now, to certain testimony of the plaintiffs on the ground that it is hearsay, particularly Mr. Sirrine's report and Mr. Cothran's report. Their testimony related that they had obtained information in there from various sources, including witnesses placed on the stand, and we think that that testimony is hearsay, and ask your Honor to consider that as we go through. The same thing as to Mr. Marshall's statement. It developed on cross-examination that it had been largely prepared for him.

The Court: In that connection, I find that there was a great deal of testimony introduced on both sides objected to as hearsay. Certain documents were introduced in evidence, too, without proof as to who made them, and circumstances under which they were made, and the question of hearsay would involve a very considerable portion of this testimony on both sides; and if the rule is applied strictly, it is going to exclude an exceedingly large portion of the transcribed testimony. But those matters you can discuss generally.

(477)

OPINION.

Filed August 12, 1935.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.
EQUITY 451.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County nd E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

This cause was previously heard by me upon motions of all defendants to dismiss plaintiffs' original and supplemental bill. At that time it was the Court's understanding that it was the desire of all defendants that the cause be finally determined upon these motions without resort to testimony. After due consideration the Court, on April 23, 1935, filed an elaborate opinion, to which reference is here craved. 7 F. Supp. 854. Immediately after the filing of this opinion, and before any order was passed, counsel for defendants appeared and submitted a request that the cause be reopened for the purpose of allowing the presentation of testimony upon

(478) the issues involved. This request was granted, and, at the request of both sides, W. M. Walters, Esq. was appointed Special Master to take the testimony and report same to the Court. This he promptly proceeded to do, and submitted to the Court from day to day the record of evidence as it was transcribed. This record consisted of 667 typewritten pages of oral testimony, together with a great many and voluminous exhibits. Upon this record the cause was argued before me orally on July 19, 1935, and thereafter counsel were permitted to submit written briefs, the last of which reached me on August 7, 1935. Realizing the importance of a prompt determination of the cause, I have studied the evidence and the briefs as carefully and as rapidly as possible upon their presentation. At the last hearing the Court invited counsel freely to discuss and criticise its former opinion, not only upon the issues of fact included in the testimony, but also upon all issues of law discussed and decided in the former opinion. That opinion went so fully into a discussion of both the law and the facts that it would be unnecessary repetition to reiterate such of those findings as are herein approved. In order, therefore, to expedite the determination of the cause, I think it sufficient to say that all findings of fact and conclusions of law set out in the opinion heretofore filed, and above-referred to, are ratified, confirmed, and adopted as the opinion of this Court, except as hereinafter modified, supplemented, denied, or explained.

I. FINDINGS OF FACT.

The Fourth finding of fact is hereby revoked. It is in accordance with the allegations of the bill, which the motion to dismiss admitted. Much of the testimony taken related to this point, and defendants introduced substantial evidence supporting their contention that the project would be self-liquidating. It is shown that extensive investigations were made, and estimate submitted to the Administrator as the result of these investigations. On the other hand, plaintiffs introduced a great deal of testimony showing investigations and estimates of able and experienced engineers to the contrary. Although, however, the Court may entertain se-

(479) rious doubts of the feasibility of the projects in the light of this testimony, it does not feel at liberty to substitute its judgment for the judgment of the Administrator. There being substantial evidence to support his findings, the decision of the Administrator is conclusive upon this Court.

Considerable evidence was introduced on the question of the adequacy of the service rendered, and to be rendered, by the plaintiffs, and the reasonableness of their rates. The territory covered by the County's proposed project, and the limits within which it may operate, are purely intrastate. It is abundantly shown that not only have the plaintiffs surplus power for sale within this territory, but that they have made provision for such future demands as may be made upon them by the acquisition of a large amount of undeveloped property, and of traffic arrangements with other power companies. In addition to this, the law has empowered the Railroad Commission to determine what rates shall be charged, with the further requirement that adequate service shall at all times be rendered. It is significant that in all the mass of testimony defendants failed to produce a single witness to the effect that an application to the plaintiffs for the furnishing of power within the territory in question has been made and refused; or that any application in respect of either rates or the furnishing of power has been presented to the Railroad Commission and refused. We think it enough to say in this respect that the administrative body selected by the State, to-wit: the Railroad Commission, has been duly charged with the supervision of these matters, and its action or failure to act is within its discretion and final, in the absence of any evidence that it has been arbitrary or has abused its discretion. Considerable evidence was introduced, including the Report of the South Carolina Power Rate Investigating Committee, and the Report of the Federal Power Commission, and other investigations on the electrical situation and national power survey. These reports, however, were and are available to the Railroad Commission for its investigation, and it is to be assumed that it discharged the duties required of it by law, and the finality of its decisions may not now be questioned by this Court.

(480) Objection is made to that portion of the third finding of fact which states, in effect, that the construction of the plant is to be under the supervision and direction of the Administrator. We think that the subsequent finding of fact, included in the previous statement of the Court, that the contract finally entered into was to be accepted as the true contract, will sufficiently explain that the Court really meant to and did, as it does now, hold that the plant is to be constructed by the County under certain supervisory terms and conditions therein outlined. The Government proposes to provide for the entire expense of construction, in part by gift or grant, the balance to be secured by self-liquidating bonds. The terms required, however, include many supervisory characteristics, such as restrictions as to labor, hours per week, minimum wages, when payment are to be made, labor preferences, the source of labor and insurance. It also requires the fixing of rates agreeable to the Administrator. Strictly speaking, supervision may consist in directing either what shall or shall not be done.

In connection with plaintiff's assertion of their status as State and Federal taxpayers, I find that the undisputed evidence shows that for the calendar year 1934, the ratio of the combined taxes of plaintiffs to their combined gross receipts was 23.96 per cent., part of which amount was paid to the Federal Government, and part to the State, counties and municipalities. Embraced in these taxes were items of State and Federal income taxes, excise taxes, franchise taxes, special privilege taxes on gross receipts, etc.

As above stated, all findings of fact included in the former opinion, not hereinabove modified or denied, are hereby ratified, confirmed, and made the finding of the Court in this opinion; and all requests for findings of fact inconsistent therewith are hereby denied.

II. CONCLUSIONS OF LAW

While numerous additional citations of authority have been presented by counsel in their final briefs in this

(481) cause, and while it might be interesting to supplement the citations and discussions of authorities set out in the original opinion, I deem it wholly unnecessary, especially since it would delay the final determination of the cause.

The constitutionality of the Act providing for the establishment of the Public Works Administration, as applicable to the facts of this case, was fully discussed under the fifth subdivision of my conclusions of law, and embraced under Sub-heads: Commerce and General Welfare. I fully approve and adopt these conclusions without modification. I also approve the conclusions as to plaintiffs' right to maintain the suit. In this connection it should be added that the evidence shows that the plaintiffs' status as taxpayers to the Federal Government, as well as to the State Government, differs essentially from that of the ordinary taxpayer, in that not only are they subjected to the payment of large property and income taxes, but they are also subjected to the payment of franchise and privilege taxes, and a special tax upon the amount of power sold. I am of opinion therefore, that their status is not limited as in the case of the plaintiffs in Commonwealth of Massachusetts v. Mellon (Frothingham v. Mellon), 262 U. S. 447, 43 S. Ct. 597, 67 L. Ed. 1078, and other cases therein cited. It is true that the specific question has never been decided by the Supreme Court. If, however, that tribunal should hold adversely to what is here indicated, it would be within the power of Congress to levy special privilege taxes far exceeding the amount shown to have been levied in this case, and leave the taxpayer without power to protect himself against complete ruin.

In the former opinion I held, and I may say with some misgivings, that there was no unlawful delegation of lgislative power under the Act in question. Mature consideration has convinced me that I was in error in this respect. The Act appropriates the sum of $3,300,000,000, of which the aggregate sum of $575,000,000 is appropriated in specified amounts to the A. A. A. and F. C. A., to Federal highways, forest highways, and subsistence homesteads. The remainder of this immense sum is undesignated, except that it is stated to be "for

(482) the purpose of this Act", covering many and widely varied projects. The Act leaves the expenditure of the remaining sum entirely in the hands of the President, with power to delegate to the Administrator of Public Works, under projects to be outlined by him and approved by the President. It is significant that no standard is set up by which the President is required to select any specific ones of the objects mentioned, no requirement that he shall allocate the funds among these objects, ratably or otherwise, nor in any standard whatever set up to guide him in the exercise of his discretion. The discretion and control given him are absolute. In aiding in the construction of public works, such as is here proposed, no standard or guide whatever is laid down by Congress other than that the grant shall not exceed thirty per cent, of the cost of the labor and materials. For the reasons above stated, we forego discussion of the authorities other than to refer to the recent decision of the Supreme Court in Schecter Poultry Corporation v. United States, 55 S. Ct. 837. The power to lay taxes and make appropriations of Federal funds rests exclusively in Congress, and its legislative duties may not be committed to any other body or person. It is true that appropriations are to be spent through the Executive Department, but only under proper standards set up by the Legislative Department. The danger of centralizing the powers of the Federal Government was foreseen, and as far as possible guarded against, by the framers of the Constitution, the spirit of which was wholly antagonistic to the thought of the centralization of power. What is said is intended to apply only to so much of the Act in question as is applicable to the facts of this case.

In the former opinion we held that the contract in question was ultra vires because the estimated revenues were insufficient to make the project self-liquidating, and thereby reasonably to secure the repayment of the loan. As above stated, that conclusion was reached upon the motions to dismiss, which admitted the allegations of the bill to that effect. In view of the foregoing finding of fact upon this point, my former conclusion of law in that respect is hereby rescinded. I think, however, that the conclusion that the Act fails to authorize the furnish-

(483) ing of any funds for the purchase of the site is correct. While the Act does authorize the Administrator to purchase sites for development, it is in connection with his purchase of such sites and acquiring title thereto; evidently purchasing for the Federal Government, and acquiring title in the Federal Government. Monies allocated only for the construction of residences could hardly be held to be properly applied to the purchase of lots upon which these structures are built.

Nothing further need be added to the conclusions formerly announced as to the plea of res adjudicata, which conclusions are ratified and approved.

For the reasons, therefore, stated in the former opinion, as herein modified and supplemented, the bill must be sustained, and the injunction must issue. An appropriate order will be filed in accordance with the views hereinabove expressed.

H. H. WATKINS,
United States District Judge.

Anderson, S. C.,
August 10, 1935.

(484) **DECREE FOR INJUNCTION.**

Filed August 26, 1935.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs. Equity 451

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof, and pursuant to the opinion filed here-

(485) in and the findings of fact and conclusions of law stated in the opinion, it is ORDERED, ADJUDGED AND DECREED, as follows:

1. That the defendants, their agents, attorneys and successors in office and each and every one of them be, and they hereby are, permanently enjoined and restrained from carrying out and performing the agreement dated as of December 8th, 1934, a copy of which, marked Exhibit A, is attached to and made a part of the answer of the defendant, Harold L. Ickes as Federal Emergency Administrator of Public Work or from construing or causing to be construed by use of Federal funds said Buzzard Roost Project referred to and described in the original Bill of Complaint or any part thereof.

2. That the defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, his attorneys, agents and successors in office, and each of them, be, and they hereby are, permanently enjoined and restrained from advancing or paying over to Greenwood County or to any officer, agent or representative of said County any federal funds for the purpose of constructing or operating said Buzzard Roost Project, or any part thereof, and from otherwise appropriating or permitting to be used any federal funds in furtherance of said project.

3. That the defendants, Greenwood County, E. L. Brooks, S. A. Agnew, and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and all other officers, agents and representatives of said County, and their successors in office, and each of them be, and they hereby are, permanently enjoined and restrained from receiving, accepting or using any federal funds for the purpose of constructing or operating said Buzzard Roost Project.

That the plaintiffs recover of the defendant, Greenwood County, the costs of this action to be taxed by the Clerk according to law.

H. H. WATKINS,
United States District Judge.

August 26, 1935.

(486) **ASSIGNMENT OF ERRORS.**

Filed August 26, 1935.

(Style of Court and Title Omitted.)

On this 26th day of August, 1935, came the defendants, Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, members of and constituting The Finance Board of Greenwood County, by Rupert F. Davis, W. H. Nicholson and D. W. Robinson, Jr., their Solicitors, and Harold L. Ickes as Federal Emergency Administrator of Public Works, by Henry T. Hunt, his Solicitor, and say that the Decree entered in the above cause on the 26th day of August, 1935, is erroneous and unjust to the defendants:

1. Because the Court erred in holding that the plaintiffs are adequately serving the counties of Greenwood, Newberry and Laurens with electrical energy at just and reasonable rates; the error being that the record shows that there is no adequate service at just and reasonable rates, and that there is a shortage of developed electrical energy in this territory.

2. Because the Court erred in holding that the Administrator of Public Works did not comply with the terms of the Recovery Act and of the President's rule in including in the comprehensive program Greenwood County's Buzzard Roost project, in that Greenwood, Newberry and Laurens Counties were being adequately served at reasonable rates by the plaintiffs; the error being:

(a) That the record shows that these three counties are not being adequately served at reasonable rates;

(b) That the Administrator's findings are not subject to review in this suit.

3. Because the Court erred in holding that the South Carolina Railroad Commission had found the plaintiffs' rates reasonable and its service adequate, and that these findings were binding upon the Court; the error being:

(487) (a) That the testimony does not show that the Railroad Commission has so found;

(b) The findings of the Railroad Commission are not conclusive upon this Court.

4. Because the Court erred in holding that the Buzzard Roost hydro-electric project would be constructed under the supervision and direction of the Federal Emergency Administrator of Public Works; the error being that the testimony shows that it would be constructed under the direction of Greenwood County and not of the Administrator.

5. Because the Court erred in holding that the purpose and effect of the purchase of the County's bonds by the Public Works Administrator would be to make municipal power rates a yardstick and bring about regulation and reduction of rates of privately owned power utilities, the error being:

(a) That the record does not sustain this finding;

(b) That the purposes of Congress in passing legislation and of the Administrator in making the allotments are not subject to judicial review;

(c) That the Court takes no cognizance of the incidental effects of the proper exercises of a power by the Government.

6. Because the Court erred in holding that neither the Recovery Act nor the loan and grant agreement permitted any of the proceeds from the loan and grant to be used for the purchase of land in the basin; the error being that a proper construction of the loan and grant agreement does permit the use of a portion of the proceeds for the purchase of land; and a proper construction of the Recovery Act permits the use of a portion of the funds for the purchase of land in the basin.

7. Because the Court erred in holding that the plaintiffs as Federal taxpayers could maintain this Bill, the error being that the record fails to disclose facts show-

(488) ing that there will be any injury or damage to the plaintiffs differing from that of any other taxpayer.

8. Because the Court erred in holding that the plaintiffs, as taxpayers of the State of South Carolina, could maintain this Bill; the error being:

(a) That the plaintiffs failed to show that as taxpayers of the State of South Carolina they would be injured or damaged by the development of the proposed project;

(b) That the Court failed to hold that the decision of the South Carolina Supreme Court in Park v. Greenwood was res adjudicata as to all questions which were or could have been raised by a taxpayer of the State of South Carolina.

9. Because the Court erred in holding that the plaintiffs as holders of valuable franchises could maintain this Bill in order to prevent unfair and illegal competition, the error being:

(a) That the competition of Greenwood County is legal and fair;

(b) That the plaintiffs are not damaged by the acts of the Administrator, even if they are ultra vires.

10. Because the Court failed to find that the plaintiffs had no standing in equity to challenge as ultra vires the acts of the Administrator under the provisions of the loan and grant agreement; the error being that these acts of the Administrator are not subect to review in equity at the instance of the plaintiffs.

11. Because the Court found that the Recovery Act unlawfully delegated powers to the President and to the Administrator of Public Works; the error being that there is no unlawful delegation.

12. Because the Court found that Title II of the Recovery Act laid down no adequate standards or guides as to public works, and that therefore there was unlawful delegation of power to the Administrator; the error be-

(489) ing that Title II of the Recovery Act provides adequate standards, and there is no unlawful delegation of power to the Executive.

13. Because the Court failed to find that the expenditures of funds appropriated by Congress and the compliance with the provisions of appropriation acts are executive functions in which no delegation of legislative power is involved; the error being that this requested finding involves a sound principle of law.

14. Because the Court found Title II of the Recovery Act (40 U. S. C. A. 401-414) could not be sustained under the property clause of the Constitution (Art. IV, Sect, 3, Clause 2); the error being that the Act finds constitutional support in this clause.

15. Because the Court erred in finding that Title II of the Recovery Act was not authorized under the general welfare clause of the Constitution (Art. I, Sect. 8, Clause 1); the error being that the Act finds constitutional support in this clause.

16. Because the Court erred in finding that Title II of the Recovery Act was not authorizing under the coefficient clause of the Constitution (Art. I, Sect. 8, Clause 18); the error being that the Act finds constitutional support in this clause.

17. Because the Court found that the Recovery Act and the Buzzard Roost allotment are not authorized under the Commerce clause of the Constitution (Art. I, Sect. 8, Clause 3); the error being that the Act finds constitutional support in this clause.

18. Because the Court failed to find that the power to appropriate for the general welfare empowered Congress to determine what is the general welfare; the error being that Congress is given such authority under the provision of the Federal Constitution, particularly Art. I, Sect. 8.

19. Because the Court failed to find that foreign and interstate commerce would be effected by the development of the Buzzard Roost project; the error being that

(490) the evidence shows that this commerce would be so effected.

20. Because the Court failed to find that Congress, under its constitutional power to create fiscal agencies of the United States Government had power to create, under the provisions of the Recovery Act, as a fiscal agency of the Public Works Administration; the error being that there is full constitutional authority for the creation of the Public Works Administration as a fiscal agency of the Government.

21. Because the Court failed to find constitutional authority for the Recovery Act in the aggregate of the powers given to Congress under the Constitution; the error being that in consideration of all of the powers given Congress under the Constitution leads to the conclusion there was ample authority for Title II of the Recovery Act.

22. Because of the failure of the Court to give consideration in determining the powers of Congress to the long practice of that body in making apropriations for the general welfare of the United States; the error being that this long practice of Congress is entitled to consideration in determining the powers of Congress.

23. The Court erred in failing to find that the plaintiffs' protest to the Public Works Administration, the hearing accorded there, and the findings of the Public Works Administration against the plaintiffs' contention estopped the plaintiffs from maintaining this Bill; the error being that having submitted themselves to the jurisdiction of an executive body they are bound by the adverse findings of that group.

24. Because the Court failed to find that Greenwood County under the laws of the State of South Carolina had full authority to construct, maintain and operate the Buzzard Roost hydro-electric project in Greenwood, Newberry and Laurens Counties, and full authority to issue revenue bonds for these purposes, the error being:

(a) That full statutory and constitutional authority is given Greenwood County for these purposes by the State of South Carolina;

(491) (b) That this authority has been sustained by the Supreme Court of South Carolina in the case of Park v. Greenwood, which is conclusive upon this Court.

25. Because the Court erred in granting the injunction and refusing to dismiss the Bill; the error being that the Court should have held:

That since the decision of the South Carolina Supreme Court in Park v. Greenwood County, plaintiffs have no standing in Court as taxpayers to raise the issues in this case.

26. Because the Court erred in granting the injunction and refusing to dismiss the Bill; the error being that the Court should have held:

That the plaintiffs have no standing in Court as the holders of franchises to maintain the Bill.

27. Because the Court erred in granting the injunction and refusing to dismiss the Bill; the error being that the Court should have held;

That the Administrator of Public Works had full constitutional and statutory authority to enter into the loan and grant agreement.

WHEREFORE the defendants pray that the said decree be reversed and the Circuit Court of Appeals directed to dismiss the Bill.

W. H. NICHOLSON,
R. F. DAVIS,
ROBINSON & ROBINSON,
Attorneys for Greenwood County and its Finance Board

August 26th, 1935.

HENRY T. HUNT,
Attorney for Harold L. Ickes, as Federal Emergency Administrator of Public Works.

INTRODUCTION.

(492) GREENWOOD COUNTY (SOUTH CAROLINA), E. L. Brooks, S. A. Agnew, and E. I. Davis, as Members of and Constituting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, appellants

v.

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY, appellees

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MOTION.

Now comes the appellant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, and respectfuly shows to this Court:

I

That the final decree, entered herein in the District Court of the United States for the Western District of South Carolina, on Augsut 26, 1935 and from which the present appeal was taken, enjoined this appellant and the appellants Greenwood County and the members of its Finance Committee, from carrying into effect an agreement referred to in the amended and supplemental bill of complaint and dated December 8, 1934 (Tr. 73-94), by which contract the United States agreed to make a loan and grant of certain sums of money to Greenwood County for the purposes of undertaking a hydro-electric project at Buzzard Roost, South Carolina. Said decree further enjoined this appellant from advancing any money to Greenwood County for the purposes of said project (Tr. 494).

II

Subsequently to the taking of this appeal and on or about November 30th, 1935, this appellant and the appellant Greenwood County entered into a contract terminating the aforesaid agreement dated December 8, 1934, and substituting a new agreement in lieu thereof, by which the United States agreed to purchase certain

(493) bonds to be issued by said county and to make a grant of certain funds thereto. The terms and conditions which were contained in the original contract of December 8, 1934, and which were held by the District Court to have been in excess of the power and authority of Greenwood County, under the laws of South Carolina, are not contained in the new contract of November 30, 1935. A copy of the aforesaid contract of November 30, 1935, is hereto annexed and marked Exhibit 1.

On December 2, 1935, two days after the execution of the superseding contract, the Finance Board for Greenwood County adopted a resolution, pursuant to Act. 299, Acts of South Carolina 1933, as amended, by which resolution the Board fixed anew, on the basis of an engineering check-up, made at its direction, rates for the project.

Wherefore, this appellant respectfully moves this Court to direct that the aforesaid Exhibit 1 be added to the Transcript of Record and be considered in connection with the pending appeal herein; that this cause be remanded to the District Court with leave to the parties to amend their pleadings in accordance with the facts above set forth and for a trial or other disposition of the cause on such amended pleadings; and that, in no event, should the final decree herein be affirmed without modifying and limiting it so as only to restrain the appellants from carrying into effect the said original agreement of December 8, 1934, and striking from the decree the provisions contained in the last clause of paragraph 1 and paragraphs 2 and 3 thereof, generally restraining this appellant from lending or granting any funds to Greenwood County for use in connection with said project, or restraining Greenwood County from using such funds in connection with said projects.

JAMES W. MORRIS,
Assistant Attorney General.
ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.
JOHN W. SCOTT,
Special Assistant to the Attorney General.
JEROME N. FRANK,
Counsel for the Federal Emergency Administration of Public Works.

(494) EXHIBIT 1

FEDERAL EMERGENCY ADMINISTRARAON,
OF PUBLIC WORKS,
Washington, D. C.

SUPERSEDING LOAN AND GRANT AGREEMENT BETWEEN THE COUNTY OF GREENWOOD, SOUTH CAROLINA, AND THE UNITED STATES OF AMERICA (P. W. A. DOCKET NO. 3972)

WHEREAS the United States of America and the County of Greenwood, South Carolina, entered into a loan and grant agreement dated as of December 8, 1934, and

WHEREAS it is deemed to the mutual advantage of said parties to terminate said loan and grant agreement and to substitute in place thereof a new agreement,

Now, therefore, it is hereby agreed by and between said parties, that said Loan and Grant Agreement dated as of December 8, 1934, be and the same hereby is terminated and the following agreement by and between said parties substituted in lieu thereof:

1. *Loan and Grant.*—The United States of America (herein called the "Government") will aid in financing the construction of a hydroelectric plant comprising an earthen dam across the Saluda River, a 15,000-Kw. Generating Station with necessary control equipment, transmission lines, and rural distribution (herein called the "Project"), by making a loan and grant to the County of Greenwood, South Carolina (herein called the "Applicant"), in an amount not exceeding in the aggregate the sum of $2,852,000.

2. *Method of Making Loan.*—The Government will purchase from the Applicant, at the principal amount thereof plus accrued interest, obligations (hereinafter called the "Bonds") of the description set forth below (or such other description as shall be mutually satisfactory) in the aggregate principal amount of $2,219,000, less such amount of such Bonds, if any, as the Applicant may sell to purchasers other than the Government:

(a) Obligor: The County of Greenwood.

(b) Type: Negotiable, special obligation, revenue serial coupon bond.

(495) (c) Denomination: $1,000.

(d) Date: October 1, 1934.

(e) Interest rate and interest payment dates: Four percentum per annum, payable semiannually on April 1 and October 1.

(f) Place of payment: At the office of the Treasurer of the Applicant in the City of Greenwood, South Carolina, or, at the option of the holder, at the office of the fiscal agent of the Applicant in the Borough of Manhattan, City and State of New York.

(g) Registration privileges: As to principal only at the option of the holder.

(h) Maturities: October 1 in years and amounts as follows:

1936	$48,000	1949	$ 92,000
1937	53,000	1950	92,000
1938	58,000	1951	97,000
1939	63,000	1952	102,000
1940	68,000	1953	107,000
1941	68,000	1954	112,000
1942	73,000	1955	112,000
1943	73,000	1956	112,000
1944	73,000	1957	117,000
1945	78,000	1958	122,000
1946	82,000	1959	122,000
1947	87,000	1960	121,000
1948	87,000		

(i) Payable as to both principal and interest from and secured by a pledged of, and first lien on a fixed amount of the gross revenues derived from the operation of the entire hydroelectric power generating, transmission, and distribution system, which fixed amount shall be sufficient at all times to pay the principal of and interest on the Bonds as and when the same become due and payable, and additionally secured by a statutory lien upon the system and any extensions or appurtenances thereto.

3. *Amount of Grant.*—The Government will make the grant in an amount equal to thirty per cent (30%) of the cost of labor and materials employed upon the Project, but not to exceed, in any event, the sum of $682,000.

4. *Conditions Precedent.*—The Government will be under no obligation to take up and pay for any Bonds which it herein agrees to purchase or to make any grant:

(496) (a) *Financial Condition.*—If the financial condition of the Applicant shall have changed unfavorably in a material degree from its condition as theretofore represented to the Government.

(b) *Cost of Project.*—If it appears that the Applicant will not be able to complete the Project for the sum allotted by the Government, or that the Applicant will not be able to obtain any funds which, in addition to such sum, will be necessary to complete the Project.

(c) *Plans and Specifications and Certificate of Purposes.*—If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

5. *Interest of Member of Congress.*—No member of or Delegate to the Congress of the United States of America shall be allowed to participate in the funds made available for the construction of the Project or to any benefit arising therefrom.

6. *Bonus or Commission.*—The Applicant shall not pay any bonus or commission for the purpose of obtaining an approval of its application for a loan and grant.

7. *Information.*—The Applicant shall furnish the Government with reasonable information and data concerning the construction, cost, and progress of the work. Upon request the Applicant shall also furnish the Government, and any purchaser from the Government of at least 25 per cent of the Bonds, with adequate financial statements and other reasonable information and data relating to the Applicant.

8. *Bond Circular.*—The Applicant shall furnish all such information in proper form for the preparation of a bond circular and shall take all such steps as the Gov-

(497) ernment or any purchaser or purchasers from the Government of not less than 25 per cent of the Bonds may reasonably require to aid in the sale by the Government or any such purchaser or purchasers of any or all of the Bonds.

9. *Insurance.*—The Applicant shall carry reasonable and adequate insurance upon the completed Project or any completed part thereof accepted by the Applicant or the system of which the Project is a part.

10. *Name of Project.*—The Applicant shall not name the Project for any living person.

11. *Grant and Bond Payments.*

(a) *Payment for Bonds.*—A requisition requesting the Government to take up and pay for Bonds will be honored as soon as possible after such Bonds are ready for delivery, if the bond transcript and other documents necessary to support such requisition are complete.

(b) *Grant Payments.*—Simultaneously with the delivery of and payment for the Bonds by the Government, or, where Bonds are taken up and paid for in more than one installment, simultaneously with the delivery of and payment for the final installment, if the Applicant shall so requisition and if such requisition is accompanied by a signed certificate of purposes in which appear in reasonable detail the purposes for which the funds will be used and that such funds will be used for items properly included as part of the cost of the Project, the Government will make a grant of an amount equal to 15 per cent of the previously estimated cost of labor and materials employed upon the Project. When the Project shall be approximately 70 per cent completed the Applicant may file its requisition for an additional grant in an amount which together with the previous grant payment is equal to 30 per cent of the cost of labor and materials employed upon the Project. The grant requisitions will be honored if the documents necessary to support such requisitions are complete and work on the Project has progressed in accordance with the provisions of this Agreement.

(c) *Final Grant Payment.*—At any time after completing the Project, the Applicant may file a requisition requesting the remainder of the grant which, together (498) with all previous payments on account of such grant, shall be an amount equal to 30 per cent of the cost of labor and materials employed upon the Project, but not to exceed, in any event, the sum of $682,000. The final grant requisition will be honored if the documents necessary to support it are complete and work on the Project has been completed in accordance with the provisions of this Agreement. The final grant payment may be made either wholly by the payment of money, or partially by payment of money and partially by cancellation of Bonds or, interest coupons or both, or wholly by such cancellation.

(d) *Construction Account.*—A separate account or accounts (herein collectively called the "Construction Accounts") shall be set up in a bank or banks which are members of the Federal Deposit Insurance Corporation and of the Federal Reserve System. The advance grant payments, the proceeds from the sale of the Bonds (exclusive of accrued interest and an amount, if any, representing interest during construction), and any other moneys which shall be required in addition to the foregoing to pay the cost of constructing the Project, shall be deposited in the Construction Account, promptly upon receipt thereof. All accrued interest paid by the Government at the time of delivery of the Bonds shall be paid into a separate account (herein called the "Bond Fund"). Payments for the construction of the Project shall be made only from the Construction Account.

(e) *Disbursement of Moneys in Construction Account.*—Moneys in the Construction Account shall be expended only for such purposes as shall have been previously specified in the certificate of purposes filed with and accepted by the Government. All moneys remaining in the Construction Account after all costs incurred in connection with the Project have been paid shall either be used to repurchase Bonds, if any such Bonds are then held by the Government, or be transferred to the Bond Fund.

(f) *Use of Moneys in Bond Fund.*—Moneys in the Bond Fund shall be expended solely for the purpose of paying interest on and principal of the Bonds.

11A. *Construction of Project.*—The following principles have been adopted by the Federal Emergency Ad-
(499) ministration of Public Works in order to effectuate the purposes of Title II of the National Industrial Recovery Act, and the making of the loan and grant herein set forth is conditioned upon the adoption of said principles by the Applicant, in the exercise of its lawful discretion, and upon its applying the same in the construction of the Project.

(a) That if a project is to be constructed under contract, contracts should be awarded to the lowest responsible bidder pursuant to public advertisement and that every opportunity be given for free, open, and competitive bidding for contracts for construction and contracts for the purchase of material and equipment.

(b) That the use in the specifications or otherwise of the name of a proprietary product or the name of the manufacturer or vendor to define the material or product required, unless such name is followed by the term "or equal", is considered contrary to the policy of free, open, and competitive bidding. Where such a specification is used in lieu of descriptive detail of substance and function, the term "or equal" is to be literally construed so that any material or article which will perform adequately the duties imposed by the general design will be considered satisfactory.

(c) That, in the interest of standardization or ultimate economy, the contract may be awarded to other than the actual lowest bidder for the supplying of materials and equipment.

(d) That, in order to insure completion of a project within the funds available for the construction thereof, faithful performance of construction contracts will be assured by requiring performance bonds written in an amount equal to 100% of the contract price by one or more corporate sureties financially able to assume the

risk, and that such bonds will be further conditioned upon the payment of all persons supplying labor and furnishing materials for the construction of the project, except where it is required by the law of South Carolina that protection for labor and materialmen be provided by a bond separate from the performance bond. In such latter case, a performance bond in an amount equal to 100% of the contract price supplemented by a separate labor and materialmen's bond in an amount not less than 50% (500) of the contract price will be adequate. However, where the contract price exceeds $1,000,000, and the obtaining of a bond written in such amount is difficult, a bond in an amount not less than 50% of the contract price will be adequate.

(e) That, if the work on any proposed construction contract is hazardous, the contractor will be required to provide public liability insurance and property damage insurance in amounts reasonably sufficient to protect the contractor and each sub-contractor.

(f) That minimum or other wage rates required to be predetermined by the law of South Carolina or local ordinance shall be predetermined in accordance therewith by the public body constructing the project, and incorporated in the appropriate contract documents. In the absence of applicable law or ordinance, such public body shall predetermine minimum wage rates, in accordance with customary local rates, for all the trades and occupations to be employed on the project, and incorporate them in the appropriate contract documents.

(g) That the work shall be commenced as quickly as possible after funds are made available and be continued to completion with all practicable dispatch in an efficient and economical manner.

(h). That the project will be constructed in accordance with the provisions of the attached Exhibit A which is hereby made a part hereof; to insure this purpose appropriate provisions will be incorporated in all contracts (except subcontracts) for work to be performed at the site of the project. (Exhibit A has been so worded that the provisions thereof may, if the public body construct-

ing the project so desires, be inserted verbatim in such construction contracts or contract.)

12. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged for the services and facilities afforded by the Project, excepting only such rights as they may have as a holder of such Bonds under the laws and the Constitution of South Carolina and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such Bonds.

(501) 13. This Agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project.

14. This entire contract is subject to the terms of the injunction decree entered by the District Court of the United States for the Western District of South Carolina.

IN WITNESS WHEREOF, the Applicant and the Government have respectively caused this Agreement to be duly executed as of November 30th, 1935.

Signed and Approved.

E. L. BROOKS,
County Supervisor.

BY COUNTY OF GREENWOOD, SOUTH CAROLINA.

Signed S. A. AGNEW,
County Treasurer.

E. L. BROOKS,
County Supervisor.

[SEAL]
Attest:

E. I. DAVIS,
Secretary of Finance Board for Greenwood County.

UNITED STATES OF AMERICA,
FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS,

BY HORATIO B. HACKETT,
Assistant Administrator.

EXHIBIT A

1. (a) *Convict Labor.*—No convict labor shall be employed on the project, and no materials manufactured or produced by convict labor shall be used on the project unless required by law.

(b) *Thirty-hour Week.*—Except in executive, administrative, and supervisory positions no individual directly employed on the project shall be permitted to work more than 8 hours in any 1 day nor more than 30 hours in any (502) 1 week: PROVIDED, That this clause shall be construed to permit working time lost because of inclement weather or unavoidable delays in any 1 week to be made up in the succeeding 20 days.

2. *Wages and Pay Rolls.*—(a) There shall be paid each employee engaged in the trade or occupation listed below not less than the hourly wage rate set opposite the same, namely:

Trade Occupation	Hourly Wage Rate
.....	.....
.....	.....

(Insert Wage Schedule Here)

If after the award of this contract it becomes necessary to employ any person in a trade or occupation not herein listed, such person shall be paid not less than such hourly rate of wage, fairly comparable to the above rates and such minimum wage rate shall be retroactive to the time of the initial employment of such person in such trade or occupation.

(b) Unless otherwise provided by law, claims or disputes pertaining to the classifications of labor under this

contract shall be decided by the Owner whose decision shall be binding on all parties concerned.

(c) All employees shall be paid in full not less often than once each week and in lawful money of the United States, in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process: PROVIDED, HOWEVER, That this clause shall not be construed to prohibit the making of deductions for premiums for compensation and medical-aid insurance, in such amounts as are authorized by the laws of..... .....to be paid by employee, in those cases in which, after the making of the deductions, the wage rates will not be lower than the minimum wage rates herein established.

(d) A clearly legible statement of all wage rates to
(503) be paid the several classes of labor employed on the work, together with a statement of the deductions therefrom for premiums for workmen's compensation and/or medical aid insurance authorized by the law of ....., should such deductions be made, shall be posted in a prominent and easily accessible place at the site of the work, and there shall be kept a true and accurate record of the hours worked by and the wages, exclusive of all authorized deductions, paid to each employee, and the Government Inspector shall be furnished with sworn pay rolls in accordance with the "Regulations Issued Pursuant to So-called 'Kick-Back Statute.'"

3. (a) *Labor preferences.*—Preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (1) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (political subdivision and/or county)..... ..... and (2) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of (State, Territory, or District) . . ..PROVIDED, That these

preferences shall apply only where such labor is available, and qualified to perform the work to which the employment relates.

(b) *Collective Bargaining.*—Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. No employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

4. *Human Labor.*—The maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage; and to the extent that the work may be accomplished at (504) no greater expense by human labor than by the use of machinery, and labor of requisite qualifications is available, such human labor shall be employed.

5. *Insurance.*—The contractor shall not commence work under this contract until he has obtained all insurance required under this paragraph and such insurance has been approved by the Owner, nor shall the contractor allow any subcontractor to commence work on his subcontract until all similar insurance required of the subcontractor has been so obtained and approved.

(*a*) *Compensation Insurance.*—The contractor shall take out and maintain during the life of this contract adequate Workmen's Compensation Insurance for all his employees employed at the site of the project and, in case any work is sublet, the contractor shall require the subcontractor similarly to provide Workmen's Compensation Insurance for the latter's employees, unless such employees are covered by the protection accorded by the contractor. In case any class of employees engaged in hazardous work under the contract at the site of the project is not protected under the Workmen's Compen-

sation statute, or in case there is no applicable Workmen's Compensation statute, the contractor shall provide and shall cause each subcontractor to provide.....
.....for the protection of his employees not otherwise protected.

(*b*) *Public Liability and Property Damage Insurance.*—The contractor shall take out and maintain during the life of this contract such Public Liability and Property Damage Insurance as shall protect him and any subcontractor performing work covered by this contract from claims for damages for personal injury, including wrongful death, as well as from claims for property damages, which may arise from operations under this contract, whether such operations be by himself or by any subcontractor or anyone directly or indirectly employed by either of them. The amounts of such insurance shall be as follows:

Public Liability Insurance in an amount not less than $..... for injuries, including wrongful death, to any one person, and subject to the same limit for each person, in an amount not less than $....., on account of one accident, and Property Damage Insurance in an amount not less than $.....

(505) Provided, however, that the Owner may accept insurance covering a subcontractor in character and amounts less than the standard requirements set forth under this sub-paragraph (b) where such standard requirements appear excessive because of the character or extent of the work to be performed by such subcontractor.

(c) The following special hazards shall be covered by rider or riders to the policy or policies required under the subparagraph (b) hereof or by separate policies or insurance in amounts as follows:

.....

6. *Persons entitled to benefits of labor provisions.*—There shall be extended to every person who performs

the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the employer and such laborer or mechanic. There shall be no discrimination in the selection of labor on the ground of race, creed, or color.

7. *Withholding payment.*—The owner may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed on the work the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics, and disburse the withheld funds, for and on account of the contractor, in the amounts and to the employees to whom they are due.

8. *Accident Prevention.*—Precaution shall be exercised at all times for the protection of persons and property. The safety provisions of applicable laws, buildings, and construction codes shall be observed. Machinery and equipment and other hazards shall be guarded in accordance with the safety provisions of the Manual of Accident Prevention in Construction, published by the Associated General Contractors of America, to the extent that such provisions are not inconsistent with applicable law or regulation.

9. *Domestic Materials.*—Unless contrary to law, in the performance of this contract the contractor, subcon-
(506) tractors, materialmen, or supplies shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except, unless otherwise required by law, foreign materials, articles, or supplies may be purchased, upon obtaining the consent of the Owner, if the foreign materials, articles, or supplies are lower in cost after the following differentials are applied in favor of domestic articles, materials, or supplies:

On purchases where the foreign bid is $100 or less, a differential of 100% will apply;

On purchases where the foreign bid exceeds $100, a differential of 25% will apply.

10. (a) *Inspection.*—The Owner reserves the right to permit such inspectors and inspection as it sees fit and hereby requires that such inspectors shall have the right to inspect all work as it progresses, and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract. The contractor shall submit to the Owner, through his authorized agents, the names and addresses of all personnel and such schedules of the cost of labor, costs and quantities of materials, and other items, supported as to correctness by such evidence, as, and in such form as, the Owner, through his authorized agents, may require.

(b) Facilities shall be provided as set forth in the specifications for the use of the Government Inspector.

11. *Reports.*—The contractor and each subcontractor shall report on forms to be furnished by the United States Department of Labor, the number of persons on their respective pay rolls directly connected with the project, the aggregate amounts of such pay rolls, and the man-hours worked, wage scales paid to the various classes of labor, and the total expenditures for materials. Forms will be supplied by the Department of Labor on the 15th of each month. The reports will cover all pay rolls from the 15th of the previous month to the 15th of the current (507) month. One copy of each of such monthly reports is to be furnished to the State Director, one to the Division of Economics and Statistics, P. W. A., and one to the United States Department of Labor, prior to the 5th day of the following month. The contractor shall also furnish to the Owner, to the State Director, and to the United States Department of Labor, the names and addresses of all subcontractors on the work at the earliest date practicable.

12. *Payments.*—(a) The contractor shall provide all labor, services, materials, and equipment necessary to

perform and complete the work under this contract. Except as otherwise approved by the Owner, the contractor (1) shall pay for in full all transportation and utility services on or before the 20th day of the month following the calendar month in which such services are rendered, and (2) shall pay for all materials, tools, and other expendible equipment, to the extent of 90 per cent of the cost thereof, on or before the 20th day of the month following the calendar month in which such materials, tools, and equipment are delivered to the project, and the balance of the cost within 30 days after completion of that part of the work in or on which such materials, tools, and other equipment are incorporated or used.

(b) *Payment of Subcontractor.*—In the absence of other provisions in this contract more favorable to the subcontractor, the contractor shall pay each subcontractor, within 5 days after each payment made to the contractor, the amount allowed the contractor for and on account of the work performed by the subcontractor, to the extent of the subcontractor's interest therein.

13. *Signs.*—The contractor shall furnish signs bearing the legend:

"FEDERAL PUBLIC WORKS PROJECT NO....."

as required in the specifications and shall erect the same at such locations as may be designated by the Owner.

14. *Subcontracts.*—Paragraphs 1 to 4, inclusive, 6, 8 to 13, inclusive, 17, the Regulations Issued Pursuant to So-called "Kick-Back Statute" and Section 35 of the Criminal Code, as amended, shall be inserted verbatim in all construction subcontracts under this contract.

(508) 15. *Assignment of Contract.*—The contractor shall not assign this contract or any part hereof without the approval of the Owner, nor with the consent of surety unless the surety has waived its right to notice of assignment.

16. *Termination for Breach.*—In the event that any of the provisions of this contract are violated by the con-

tractor or by any of his subcontractors, the Owner may serve written notice upon the contractor and the surety of his intention to terminate such contract, such notices to contain the reasons for such intention to terminate the contract, and, unless within 10 days after the serving of such notice upon the contractor such violation shall cease and satisfactory arrangement for correction be made, the contract shall, upon the expiration of said 10 days, cease and terminate. In the event of any such termination, the Owner shall immediately serve notice thereof upon the surety and the contractor, and the surety shall have the right to take over and perform the contract, provided, however, that if the surety does not commence performance thereof within 30 days from the date of the mailing to such surety of notice of termination, the Owner may take over the work and prosecute the same to completion by contract for the account and at the expense of the contractor, and the contractor and his surety shall be liable to the Owner for any excess cost occasioned the Owner thereby, and in such event the Owner may take possession of and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor.

17. *Definitions.*—The term "Act" as used herein refers to Title II of the National Industrial Recovery Act. The term "State Director" as used herein refers to the State Director (P. W. A.) or his duly authorized representative, or any person designated to perform his duties or functions under this agreement by the Administrator. The term "Government Inspector" as used herein refers to State Engineer Inspectors, resident and assistant resident engineer inspectors, and supervising engineers, appointed by the Administrator. The term "materials" as used herein includes, in addition to materials incorporated in the project used or to be used in the operation thereof, equipment and other materials used and/or consumed in the performance of the work. (509) The term "Owner" as used herein refers to the public body, agency, or instrumentality which is a party hereto and for which this contract is to be performed.

The 30-hour week requirement shall be construed—

(a) To permit the limitation of not more than 130

hours' work in any 1 calendar month to be substituted for the requirement of not more than 30 hours' work in any 1 week on projects in localities where a sufficient amount of labor is not available in the immediate vicinity of the work.

(b) To permit work up to 8 hours a day or up to 40 hours a week on projects located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed.

In case it shall be determined prior to advertisement that any projects falls within the terms of (a) hereof, the following proviso shall be added at the end of paragraph 1 (b):

And provided, further, It having been determined prior to advertisement that a sufficient amount of labor is not available in the immediate vicinity of the work, that a limitation of not more than 130 hours' work in any 1 calendar month may be substituted for the requirement of not more than 30 hours' work in any 1 week on the project.

In case it shall be determined prior to advertisement that any project falls within the terms of (b) hereof, the following section shall be substituted in the place of paragraph 1 (b):

(b) *Hours of Labor.*—Except in executive, administrative, and supervisory positions, no individual directly employed on the project shall be permitted to work more than 40 hours in any 1 week nor more than 8 hours in any 1 day. It having been determined prior to advertisement that the work will be located at points so remote and inaccessible that camps or floating plants are necessary for the housing and boarding of all the labor employed, this provision shall apply in lieu of the usual 30-hour terms.

REGULATIONS ISSUED PURSUANT TO SO-CALLED "KICK-BACK STATUTE"

(510) Pursuant to the provisions of Public Act No. 324, Seventy-third Congress, approved June 13, 1934 (48 Stat. 948), concerning rates of pay for labor, the Sec-

retary of the Treasury and the Secretary of the Interior hereby jointly promulgate the following regulations:

SECTION 1. Said Act reads as follows:

To effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.

Be It Enacted by the Senate and House of Representatves of the United States of America in Congress Assembled. That whoever shall induce any person employed in the construction, prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment by force, intimidation, threat or procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

SEC. 2. To aid in the enforcement of the above section, the Secretary of the Treasury and the Secretary of the Interior jointly shall make reasonable regulations for contractors or subcontractors on any such building or work, including a provision that each contractor and subcontractor shall furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week.

SECTION 2. Each contractor and subcontractor engaged in the construction, prosecution, or completion of any building or work of the United States or of any building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof, shall furnish each week an affidavit with respect to the wages paid each employee during the preceding week. Said affidavit shall be in the following form:

State of .....
County of....., *ss*:

I, ... (name the party signing affidavit), ... (Title), do hereby certify that I am (the employee of) .....
(511) ..... (name of contractor or subcontractor) who supervises the payment of the employees of said contractor (subcontractor); that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor (subcontractor) for the construction of ..... (project) for the weekly pay roll period from the ..... day of ....., 193...., to the ..... day of ....., 193,...., that no rebates or deductions from any wages due any such person as set out on the attached pay roll have been directly or indirectly made; and that, to the best of my knowledge and belief, there exists no agreement or understanding with any person employed on the project, or any person whatsoever, pursuant to which it is contemplated that I or anyone else shall, directly or indirectly, by force, intimidation, threat, or otherwise, induce or receive any deductions or rebates in any manner whatsoever from any sum paid or to be paid to any person at any time for labor performed or to be performed under the contract for the above named project.

Sworn to before me this ..... day of ....., 193.....

SECTION 3. Said affidavit shall be executed and sworn to by the officer or employee of the contractor or subcontractor who supervises the payment of its employees.

Said affidavit shall be delivered, within three days after the payment of the pay roll to which it is attached to the Government representative in charge at the site of the particular project in respect of which it is furnished, who shall forward the same promptly to the Federal agency having control of such project. If no Government representative is in charge at the site, such affidavit shall be mailed within such three-day period to the Federal agency having control of the project.

SECTION 4. At the time upon which the first affidavit with respect to the wages paid to employees is required to be filed by a contractor or subcontractor pursuant to

the requirements of these regulations, there shall also be filed in the manner required by Section 3 hereof a statement under oath by the contractor or subcontractor, setting forth the name of its officer or employee who su-
(512) pervises the payment of employees, and that such officer or employee is in a position to have full knowledge of the facts set forth in the form of affidavit required by Section 2 hereof. A similar affidavit shall be immediately filed in the event of a change in the officer or employee who supervises the payment of employees. In the event that the contractor or subcontractor is a corporation, such affidavit shall be executed by its president or a vice president. In the event that the contractor or subcontractor is a partnership, such affidavit shall be executed by a member of the firm.

SECTION 5. These regulations shall be made a part of each contract executed after the effective date hereof by the Government for any of the purposes enumerated in Section 2 hereof.

SECTION 6. These regulations shall become effective on January 15, 1935.

The clause in the pay roll affidavit which reads "* * * that the attached pay roll is a true and accurate report of the full weekly wages due and paid to each person employed by the said contractor * * * " is construed by the Public Works Administration to mean:

(a) Wages due are the wage earned during the pay period by each person employed by the contractor, less any deductions required by law.

(b) At the time of signing the affidavit, the wages due each employee have either been paid to him in full or are being held subject to claim by him.

(c) Such unpaid wages will be paid in full on demand of the employee entitled to receive them.

The clause " * * * that no rebates or deductions from

any wages due any such person as set out on the attached pay roll have been directly or indirectly made" does not apply to any legitimate deductions mentioned above which enter into the computation of full weekly wages due.

The "Regulations Issued Pursuant to So-Called 'Kick-Back' Statute" shall not be construed to prohibit deductions required by law or deductions for health, sickness, unemployment, or other similar benefits voluntarily authorized by permanent employees of equipment sup-
(513) plies engaged in installation of the equipment at the site of the project.

PENALTY

Section 35 of the Criminal Code, as amended, provides a penalty of not more than $10,000 or imprisonment of not more than 10 years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statements * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement * * * " relating to any matter within the jurisdiction of any governmental department or agency.

(514) GREENWOOD DIVISION

Equity 451

No. 3971

UNITED STATES CIRCUIT COURT OF APPEALS
FOURTH CIRCUIT

Greenwood County, et al., Appellants,

VS.

Duke Power Company, et al., Appellees.

MANDATE

United States District Court
West. Dist. of So. Car.
FILED
DEC. 7, 1935
W. D. WHITE, Clerk.

UNITED STATES OF AMERICA, *ss*:
The President of the United States of America,

To the Honorable Judge of the District Court of the United States for the Western District of South Carolina.

Greeting:

WHEREAS, lately in the District Court of the United States for the Western District of South Carolina, before you or some of you, in a cause between Duke Power Company and Southern Public Utilities Company, Complainants, and Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, Defendants; In Equity No. 451; wherein Harold L. Ickes, as Federal Emergency Administrator of Public Works was made a party defendant; and wherein the decree of the said District Court, entered in the said cause on the 26th day of August, 1935, is in the words following, to-wit:

"This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consid-
(515) eration thereof, and pursuant to the opinion filed herein and the findings of fact and conclusions of law stated in the opinion, it is ORDERED, ADJUDGED AND DECREED, as follows:

"1. That the defendants, their agents, attorneys and successors in office and each and every one of them be, and they hereby are, permanently enjoined and restrained from carrying out and performing the agreement dated as of December 8th, 1934, a copy of which, marked Exhibit A, is attached to and made a part of the answer of

the defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works or from construing or causing to be construed by use of Federal Funds said Buzzard Roost Project referred to and described in the original Bill of Complaint or any part thereof.

"2. That the defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, his attorneys, agents and successors in office, and each of them, be, and they hereby are, permanently enjoined and restrained from advancing or paying over to Greenwood County or to any officer, agent or representative of said County any federal funds for the purpose of constructing or operating said Buzzard Roost Project, or any part thereof, and from otherwise appropriating or permitting to be used any federal funds in furtherance of said project.

"3. That the defendants, Greenwood County, E. L. Brooks, S. A. Agnew, and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and all other officers, agents and representatives of said County, and their successors in office, and each of them be, and they hereby are, permanently enjoined and restrained from receiving, accepting or using any federal funds for the purpose of constructing or operating said Buzzard Roost Project.

"That the plaintiffs recover of the defendant, Greenwood County, the costs of this action to be taxed by the Clerk according to law.

H. H. WATKINS,
United States District Judge."

August 26, 1935.

(516) as by the inspection of the transcript of the record of the said Dstrict Court, which was brought into the United States Circuit Court of Appeals for the Fourth Circuit by virtue of the appeal of the said Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes as Federal Emergency Administrator of Public Works, agreeably to the Act of Congress, in such case made and provided, fully and at large appears,

AND WHEREAS, in the term of November, in the year of our Lord one thousand nine hundred and thirty-five, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Fourth Circuit, on the motion of Harold L. Ickes, Federal Emergency Administrator of Public Works, one of the appellants, that the said cause be remanded to the District Court for the Western District of South Carolina to the end that that court may reconsider its decision in the light of the contract entered into between the United States and the County of Greenwood, South Carolina, dated November 30, 1935:

It is ordered that said cause be remanded to the said District Court to the end that that court may reconsider its decision in the light of the said contract and may take such further action as may be appropriate in the premises.

The Court below is requested to hear the cause thus remanded with all convenient dispatch and to certify his findings of fact and conclusions of law to this court as soon as possible, to the end that the cause may be heard by this court upon appeal on the first Monday in January, 1936, in accordance with the agreement of counsel this day made in open court to the effect that they would press for a speedy hearing of the cause and docket the appeal from the decision of the court below for hearing on the date aforesaid without reference to the rules regulating appeals, filing and printing of briefs, etc. Let mandate issue forthwith.

This the 5th day of December, 1935.

JOHN J. PARKER,
Senior Circuit Judge.

You, therefore, are hereby commanded that such further proceedings be had in said cause in accordance (517) with the order of this Court as according to right and justice and the laws of the United States, are to be had, the said appeal notwithstanding.

WITNESS the Honorable Charles Evans Hughes, Chief Justice of the United States, the sixth day of De-

cember, in the year of our Lord one thousand nine hundred and thirty-five.

CLAUDE M. DEAN,
Clerk of the United States
Circuit Court of Appeals
For the Fourth Circuit.

(518) **REPORT TO CIRCUIT COURT OF APPEALS OF FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO ORDER OF REMAND.**

Filed Dec. 31, 1935.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs. EQUITY 451.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

This cause has again come before me upon a mandate of the Circuit Court of Appeals issued pursuant to an order dated December 5, 1935, which, being a part of the records of that Court, need not here be set out in full. The cause was remanded to the District Court to the end that it might reconsider its decision in the light of a contract entered into between the United States and the County of Greenwood, South Carolina, dated November 30, 1935, and might take such further action as might be appropriate in the premises. The order embraced a request that the cause thus remanded should be heard with all convenient dispatch, and that this Court certify its findings of fact and conclusions of law to the Circuit

Court of Appeals as soon as possible, to the end that the cause may be heard on appeal on the first Monday in January, 1936, in accordance with counsels' agreement made in open court that they would press for a speedy hearing of the cause, and docket the appeal from the decision of the Court below for hearing on the aforementioned date, without reference to the rules regulating appeals, filing and printing of briefs, etc. Pursuant to said order and mandate, a hearing was had at Spartanburg, South Carolina, on December 12 and 13, 1935, attended by counsel for all the parties. This was the earliest date upon which it was found possible to procure the attendance of counsel and witnesses. The first day was consumed in the preliminary discussions of the (519) cause and the taking of testimony, and the second day in hearing argument. The testimony offered included the oral testimony of the Public Works Administrator, Mr. Harold L. Ickes, of E. I. Davis, Secretary of the Finance Board of Greenwood County, and of D. T. Duncan, Chief Engineer on the Buzzard Roost project. There was also submitted the Minute Book of the Greenwood County Finance Board, showing authority for the execution of the new contract. In addition to this was presented, subject to objection, certain documentary evidence, including, *inter alia,* a book entitled, "Back to Work", by Harold L. Ickes, with particular reference to certain statements therein contained. In order to expedite the hearing, it was agreed by counsel that all oral evidence other than that relating to the formal execution of the new contract referred to, should be taken subject to objection and for the purpose of making up the record, and that after argument, the Court could rule upon its competency. Prior to the introduction of any testimony, one of plaintiffs' counsel stated that he had previously called the attention of Mr. Holtzoff, one of defendants' counsel, to the fact that the only pleadings now before the Court, and the only issues now before the Court, were the pleadings and issues before the Court prior to the entry of the final decree in this case, and that since the entry of the final decree, no supplemental pleadings have been filed, and no new issues have been raised. In reply, Mr. Holtzoff admitted his statement that the issues were the issues formed by the present pleadings, and that under the terms of the order of remand, there was not time to file supplemental pleadings, as would

be done were this case to proceed in the usual due fashion. Pursuant to this understanding, the Court heard the testimony, at the conclusion of which counsel for the defendants submitted a motion, as follows:

> "1. Now comes the defendants, jointly, separately and severally, and all and each of them, at the close of the evidence, and move the Court herein that the record on appeal in this cause, be supplemented by adding thereto and making a part thereof all of the testimony of all of the witnesses offered, heard or excluded by the Court at its hearing of said cause on the 12th day of December, 1935, together with all exhibits tendered or offered to, accepted or excluded by the Court during the hearing thereof on said date.
>
> 2. And said defendants further move that the (520) separate and several answers of the defendants herein be taken as amended and supplemented in accordance with the above-mentioned proof and evidence, both oral and documentary, adduced at the hearing of this Court held on the 12th day of December, 1935, in accordance with the order of remand issued therefor by the Circuit Court of Appeals of the Fourth Circuit on December 5, 1935, only to the extent, however, of such testimony as was submitted, offered and/or tendered by said defendants at such hearing."

So much of the motion as was embraced under Subhead 1 was granted, and that embraced under Subhead 2 was overruled and disallowed. In overruling the motion, the Court stated that it did not think, first of all, that it comes within the scope of the order, and, second, that it did not think it had a right to allow an amendment under the status of this case, and, particularly, that it would be an abuse of discretion for the amendment to come now.

The Court holds, in ruling on the testimony, that all evidence relating to the formal execution of the new contract, and the contract itself as admitted in evidence, has been properly admitted under the terms of the order of the Circuit Court of Appeals, but for reasons that will be more fully hereinafter discussed, the oral evidence of Mr. Ickes, and documentary evidence relating to other

matters such as rates and purposes and policies of the Administration, are incompetent, and must be excluded from consideration. The only documentary evidence admissible is such as related to the execution of the new contract, and authority therefor. In addition to the facts contained in the foregoing preliminary statement, I further submit the following:

FINDINGS OF FACTS:

1. This cause was heard at the summer term, 1935, of this Court; the final opinion was filed August 10, 1935; the final decree was entered August 26, 1935, after all counsel then of record for the defendants had been duly notified, in order that they might take exceptions and be heard as to the provisions of said final decree at and before the time of its filing; and the term of court at which the decree was entered ended on September 9, 1935. All the defendants appeared to the Circuit Court of Appeals of this Circuit, the petition for appeal having been filed and allowed on August 26, 1935. The appeal (521) bond was approved August 30, 1935. The transcript of record on appeal was filed in the Circuit Court of Appeals on October 11, 1935. No motion was made in the trial court after the filing of the final decree and prior to the end of the term when the Court had lost jurisdiction, nor has any since been made before it to reopen the case because of after-discovered evidence, or because of a change of the law, or because of its overlooking any material point of law or fact.

2. The contract of November 30, 1935, makes no change in the character, scope, or purpose of the project, or in the nature of the business in which it would engage or the territory in which it would operate in the event it should be constructed and put in operation. Nor does the new contract make any change in the amount of the Federal funds to be advanced by the Administrator for the construction of the project. The Administrator has heretofore advanced to the officials of the County, under the contract of December 8, 1934, the sum of $65,000.00 for the construction of the project. The money so advanced has been expended in work on the project and if the parties were permitted to proceed, the project would be constructed and put in operation as originally contemplated. It is further significant that there is no

evidence that any new application for the loan and grant was filed by the County, and it is to be assumed that the new contract was entered into pursuant to the original application.

3. The new contract omits certain specific provisions contained in the old contract giving the Administrator supervision and direction over the construction of the project; but the control of the Administrator over the construction, although provided for in more general terms, is effectively retained. This will more fully appear by reference to the contract itself, and particularly to the provisions of Exhibit "A", thereto attached and made a part thereof. Under the new contract, as under the old, the entire cost of construction would be defrayed out of the Federal funds to be advanced by the Administrator, and under neither contract does Greenwood County assume any obligation for the construction and completion of the project, except by the use of such funds. Particular attention is called to the requirements in Exhibit "A", made a part of the new contract, which subject contractors on an intrastate project to Federal regulation, such as those issued pursuant to the so-called "Kick-Back Statute", and other supervisory requirements, such as those relating to sources of labor, hours of work, collective bargaining, reports, and the (522) designation of the project as a Federal Public Works project, etc.

4. The new contract eliminates the provision referred to in the original seventh finding of fact requiring the County to "adopt a resolution satisfactory in form and substance to the Administrator providing for rates to be charged for services afforded by the hydro-electric system." But the rates to be charged for the power to be produced by the project were adopted by the County with the approval of the Administrator under the provisions of the contract of December 8, 1934, and have not been changed. On the basis of these rates the County, prior to the modification or change of said contract, made contracts with customers of plaintiffs for the sale of most of the power which would be produced. These contracts for the sale of said power have not been changed, and if the project is constructed will be carried out.

5. The sixth finding of fact made on the original hearing relates to the power policy of the Federal Emer-

gency Administrator of Public Works in making or withholding appropriations of Federal funds to municipally-owned power projects, and the evidence taken on the original hearing shows that the approval of the loan and grant in this case was made in order to effectuate this policy. The evidence introduced by defendants on the last hearing shows, and the Court finds as a fact, that there has been no change in this power policy since the entry of the original decree on August 26, 1935.

6. I find specifically that the cheaper rates shown by the contracts between Greenwood County and its prospective customers will necessarily furnish the most effective "yardstick" or measurement of the rates to be charged by its competitors, both in connection with, and independently of, the purposes and policies of the Public Works Administration, as established by the evidence on the former hearing.

LEGAL ISSUES PRESENTED AND CONSIDERED:

This Court regrets that the necessity of immediate determination of the issues presented to it, under the order of remand, precludes such investigation of the legal issues presented for its determination, and such investigation and discussion of the authorities bearing thereon, as the importance of the cause would properly demand. At the beginning of the hearing, counsel for (523) plaintiffs called attention to their objection to the order of remand, as presented by them to the Appellate Court. We held, however, and understood it to be conceded, that this Court was, and is, bound by the order, and could, and can, consider only such questions as involve the scope and construction of the requirements of the order. This requires unequivocally, as I understand it, the admission in evidence of the new contract of November 30, 1935, and a determination, under my findings of fact and conclusions of law, of the force and effect of this contract upon my former decisions. As thorough an investigation of the authorities as has been possible under the circumstances since the order of remand was issued, taken in connection with considerable previous investigation on the issues involved, has convinced me that the law does not permit a reopening of the evidence in this case as to the aims and purposes of the Public Works Administration, nor as to the reason-

ableness of the rates charged by plaintiffs, as to the adequacy of plaintiffs' service, and other issues about which evidence was taken, and which were fully determined upon that evidence, at the former trial. Furthermore, the promptness required for the rehearing by this Court, and its determination, indicates conclusively to my mind that the Circuit Court of Appeals did not intend by its order that the pleadings should be amended and the evidence reopened to allow the presentation and consideration of any facts other than the force and effect of the new contract, and to what extent, if any, its provisions might require a reversal or modification of my former determinations. In the case of *Buffington v. Harvey*, 95 U.S. 99, 24 L.ed. 381, Mr. Justice Bradley, in discussing a proceeding in the nature of a bill of review founded on new matter, stated that an issue of fact could be raised "only as it relates to the truth and sufficiency of such new matter, and the propriety of its admission for the purpose of opening the decree in the original cause," and further that "the evidence in the original cause cannot be discussed for the purpose of questioning the propriety of the original decree as based on such evidence. It can only be adverted to, if at all, for the purpose of showing the relevancy and bearing of the new matter sought to be introduced into the cause." See, also, 4 Cyc. Fed. Proc., Section 1155 and 1139; Hughes on Federal Practice, Vol. 7, Sec. 4493; *Lavagnino v. Prall*, 281 Fed. 581, 583; *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 61 L.ed. 1148; *McCarthy v. Lumber Co.*, 219 Mass. 566; 34 C.J. 743; 54 C. J. 720; *Burlen* v. *Shannon*, 99 Mass. 200. As stated above, the (524) term of court at which the original decree was entered expired on September 9, 1935. No motion for a new trial was made before the trial court prior to the time it lost jurisdiction, and the matter now presented to the Court under the order of remand relates entirely to what has occurred since the trial of the cause; and the order of remand is limited to a consideration of the effect of the new contract upon the issues decided, and does not contemplate the reopening of the cause for a retrial of issues there properly presented and there properly decided, or if improperly decided, to be reversed by the Appellate Court only for errors appearing in that record. *Roemer v. Simon*, 91 U.S. 149, 23 L.ed. 267; *Realty Acceptance Corp. v. Montgomery*, 284 U.S. 547, 76 L.ed.

476; *Jensen v. New York Life Ins, Co.*, (CCA-8), 59 F.(2d) 957; *Chisholm-Ryder Co. v. Buck*, (CCA-4), 65 F.(2d) 735. Equity Rule 69 provides that "No rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the Circuit Court of Appeals or the Supreme Court." In Hughes on Federal Practice, Vol. 8, Sec. 5656, the rule is stated, as follows: "No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes or to reinstate a cause dismissed by mistake." At the former hearings, the Federal Emergency Administrator of Public Works was represented by Henry T. Hunt, Esq., who is not only a lawyer of great ability, but who had served as chairman of the Electric Power Board of Review. One of the witnesses produced by him was Mr. Clarence E. Rose, a member of the engineering staff. He testified at length in respect to the policies and practices of the Public Works Administration relating to the establishment of these projects, in connection with their effect upon the rates of competitive companies, as well as the engineering features of the project. All questions relating to the reasonableness of the rates of plaintiffs were fully testified to by both sides. To permit the excluded testimony of Secretary Ickes would not only reopen the trial of all issues regarding rates, reasonableness of service, and the policies of the Public Works Administration, but would be in contradiction of the Government's own witness, and this after the lapse of several months after he was advised of the general result of the decision and his counsel was advised of all the details of the trial. While it is true that Mr. Ickes testified that he had not (525) read the testimony of Mr. Rose until very recently, he must, of course, be charged with constructive notice of all the proceedings in a cause in which he was a defendant and represented by able counsel.

We call particular attention to the able and interesting opinion of Mr. Justice Roberts in the case of *Realty Acceptance Corp v. Montgomery, supra,* and the authorities therein cited, and also to *Barker Painting Co. v. Local No. 734, Brotherhood of Painters, etc., et al.*, 281 U. S. 462, 50 S.Ct. 356, 74 L.ed. 957; and *Delaware &*

Hudson Co. v. Stankus, (CCA-3), 63 F.(2d) 887. The limitations upon the court below are discussed by the Circuit Court of Appeals of this Circuit in the cases of *Chisholm-Ryder Co v. Buck, supra; Underwood v. Commissioner of Internal Revenue,* 56 F.(2d) 67; and *Finefrock v. Kenova Mine Car Co.,* 22 F.(2d) 627. In the last mentioned case the Court said that there is abundant authority for the Appellate Court to remand, without determining and disposing of a case, "if the case has been tried on a wrong theory, or the record is not in condition for the Appellate Court to decide the questions presented, with justice to all the parties concerned."

Under the rules of law established by the foregoing cases, and the facts of the case as hereinbefore stated, the Court has arrived at the following.

CONCLUSIONS OF LAW:

1. The conclusions of law on which the original decree was based are fully set forth in my two prior opinions, and need not be further discussed. I find that the substitution of the new contract introduced in evidence, along with such testimony as was admitted by this Court to be competent, does not in any way call for a modification of the conclusions stated in my former opinions, and does not modify their application to this cause. All conclusions of law, therefore, stated in the first of my former opinions, as modified by my second opinion, are hereby reaffirmed.

2. I conclude further that the order of injunction heretofore entered by me under date of August 26, 1935, is, and should be, made applicable to the new contract introduced in evidence at this last hearing.

3. In order that the Appellate Court may be fully advised of my conclusions, I will state that it is my judg-
(526) ment that even if the excluded testimony at this last hearing should have been admitted, considered, and accepted as true, it would be insufficient, as a matter of law, to furnish a basis for any modification of my former conclusions of law. Whatever might be the purposes, policies, and practices of the Public Works Administration in reference to competitors, in financing the instant enterprise the result to the plaintiffs would be the same.

The lower rates which the enterprise may be able to charge because of Government aid through its loan and grant—particularly the latter—would effectively establish a "yardstick" or rate of charge which plaintiffs must inevitably meet, or have their business *pro tanto* destroyed.

I herewith present and certify the foregoing discussion, findings of fact, and conclusions of law for the consideration of the Circuit Court of Appeals of the Fourth Circuit.

(s) H. H. WATKINS,
United States District Judge

Anderson, S. C.,
December 21, 1935.

(527) **DECREE.**

Filed December 21, 1935.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County, and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

This cause came on to be heard at this term pursuant to the mandate of the Circuit Court of Appeals issued December 6th, 1935, upon the application of the defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, that the court reconsider its decree entered herein under date of August 26, 1935, in the light of the contract entered into between the United States of America and the County of Greenwood, South Carolina, dated November 30, 1935, and set aside and vacate said decree. The cause was argued by counsel, and thereupon, and upon consideration thereof, and pursuant to the

opinion filed herein under date December 21, 1935, entitled "Report to the Circuit Court of Appeals of Findings of Fact and Conclusions of Law Pursuant to Order of Remand", and the findings of fact and conclusions of law stated therein;

IT IS ORDERED, ADJUDGED AND DECREED that the application to set aside and vacate the decree for injunction entered and filed herein under date of August 26, 1935, be, and the same hereby is, denied.

(signed) H. H. WATKINS,
December 21, 1935. United States District Judge.

(528) **ASSIGNMENT OF ERRORS.**

Filed Dec. 31, 1935.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company,
Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

On this 31st day of December, 1935, came the defendants, Greenwood County and E. I. Brooks, S. A. Agnew and E. I. Davis, members of and constituting The Finance Board of Greenwood County, by Rupert F. Davis, W. H. Nicholson and D. W. Robinson, Jr., their Solicitors, and say that the Report to Circuit Court of Appeals of Findings of Fact and Conclusions of Law Pursuant to Order of Remand entered in the above cause on the 21st day of December, 1935, is erroneous and unjust to these defendants:

1. Because the Court erred in refusing to consider the oral tesimony of the witnesses, Harold L. Ickes, E. I. Davis and D. T. Duncan and refusing to consider the documentary evidence offered at the hearing December 12-13, 1935; the error being that the evidence was competent and admissible under the Order of the Circuit Court of Appeals of December 5, 1935.

2. Because the Court erred in refusing to permit the answers of the defendants to be amended to conform to the proof; the error being that it was necessary to amend the answers to show the execution of the new contract in accordance with the order and mandate of the Circuit Court of Appeals.

3. Because the Court ererd in finding that the contract of November 30, 1935, made no change in the character, scope or purpose of the Buzzard Roost project; (529) the error being that the contract of November 30, 1935, materially changed the situation from that presented under the contract of December 8, 1934, with particular reference to the rate clauses and the construction clauses.

4. Because the Court erred in finding as a fact that under the new contract the Administrator of Public Works effectively retained control over the construction of the project; the error being that under the contract of November 30, 1935, the control and supervision of the construction is in the hands of Greenwood County, and the Court should have so held.

5. Because the Court erred in holding in its fourth finding of fact that under the contract of November 30, 1935, the Administrator of Public Works retained a degree of control over the rates to be charged by Greenwood County; the error being that no control of the rates is given under this contract.

6. Because the Court erred in its fifth finding of fact in holding that the evidence introduced by the defendants at the hearing on December 12-13, 1935, that there has been no change in the power policy since the entry of the original contract; the error being:

(a) That the Court having excluded this testimony it cannot base a finding of fact thereon;

(b) The testimony shows that the Public Works Administration has no power policy separate and distinct from the general policy of the Public Works Administration.

7. Because the Court erred in its sixth finding of fact to the effect that the contract between Greenwood County and its prospective customers would furnish an effective yardstick of the rates to be charged by the County's competitors; the error being

(a) The Court having held that it could not inquire into matters effected by testimony given before the final decree it was erroneous for the Court to make this finding based upon testimony taken prior to the 26th of August, 1935;

(b) That the effect of contracts lawfully entered into between Greenwood County and its prospective customers is not the subject of judicial review.

8. Because the Court erred in refusing to consider any testimony other than the formal proof of the contract (530) of November 30, 1935; the error being that under the order and mandate of the Circuit Court of Appeals the Court should have considered all of the testimony offered by the defendants.

9. Because the Court ererd in its first conclusion of law in holding that the substitution of the new contract does not in any way call for a modification of the previous conclusions of law; the error being that with the new contract before the Court the Court should have held despite its conclusions as to the constitutionality of the statute that the plaintiffs have no right, in view of the terms of the new contract, to maintain this action.

10. Because the Court erred in refusing to set aside its injunction order of the 26th of August, 1935, and in making that injunction order applicable to the new contract of November 30, 1935; the error being that in view of the terms of the new contract the Public Works Ad-

ministration and Greenwood County should not be enjoined from proceeding with the Buzzard Roost projects under the terms of that contract.

11. Because the Court erred in holding that even if it admitted testimony offered at the hearing December 12-13, 1935, such testimony was insufficient to furnish a basis for a modification of the former conclusions of law; the error being that under such testimony the Court should have held the plaintiffs had no right to maintain this Bill.

12. Because the Court erred in holding that the effect of the financing of this project by the Public Works Administration is to furnish a yardstick for rates for privately owned utilities; the error that the Court should have found:

(a) That such was not the effect; and

(b) That the ffect of the legal action of the Public Works Administration is not a subject for judicial review.

W. H. NICHOLSON,
R. F. DAVIS,
ROBINSON & ROBINSON,
Attorneys for Greenwood County
and its Finance Board.

December 23, 1935.

(531) **ASSIGNMENTS OF ERROR OF THE FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Filed Dec. 31, 1935.

Duke Power Company and Southern Public Utilities Company,
Plaintiffs,
vs. EQUITY 451

Greenwood County, Et Al.,
Defendants.

Now comes the defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, and says that in the report to the Circuit Court of Appeals of findings of fact and conclusions of law pursuant to order of remand, filed in the above cause on the 21st day of December, 1935, there is manifest error, and for error he assigns the following:

1. The District Court erred in making the finding contained in the first sentence of Finding on Fact No. 2 and likewise the last two sentences of Finding of Fact No. 2.

2. The District Court erred in finding in fact No. 3 that the control of the Administrator over the construction of the project is effectively retained under the new contract.

3. The District Court erred in making all of the finding of fact No. 4 except the first sentence thereof.

4. The District Court erred in making Finding of Fact No. 5.

5. The District Court erered in making Finding of Fact No. 6.

6. The District Court erred in making conclusion of law No. 1.

7. The District Court erred in making conclusion of law No. 2.

8. The District Court erred in making the conclusion of law No. 3.

(532) 9. The District Court erred in excluding the testimony of Harold L. Ickes offered, tendered and excluded at the hearing.

10. The District Court erred in excluding the testi-

mony of the witness E. I. Davis offered, tendered and excluded at the hearing.

11. The District Court erred in excluding the testimony of the witness D. T. Duncan offered, tendered and excluded at the hearing.

12. The District Court erred in excluding from evidence the written report of Harold L. Ickes as Federal Emergency Relief Administrator of Public Works made to the Congress of the United States, Senate Document No. 167, 73d Congress 2nd Session, and identified as defendants' exhibit 70.

13. The District Court ererd in denying defendants' motion that the answer of the defendant Ickes be amended and supplemented to conform to the proof, both oral and documentary, adduced at the hearing in accordance with the order of remand, only to the extent, however, of the testimony submitted, offered and tendered by the several defendants.

14. The District Court erred in denying the motion of the defendants that the answer of the defendant Ickes be amended and supplemented to conform to the proof, both oral and documentary, as introduced in accordance with the new contract of November 30, 1935.

15. The District Court erred in making the conclusion of law that this Court may not consider any evidence other than the new contract between the defendants.

16. The District Court erred in making the conclusion of law of this Court that even if said excluded testimony had been accepted and considered by it, that the same was not sufficient in law to warrant a change in defendants original findings or conclusions of law stated thereon.

WHEREFORE, the defendants, Harold L. Ickes, as Federal Emergency Administrator of Public Works, prays that the decree herein be reversed, and that the (533) bill of complaint be dismissed, and that said de-

fendant have all other and further relief appropriate in the premises.

JAS. W. MORRIS,
Assistant Attorney General.
ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.
JOHN W. SCOTT,
Special Assistant to the Attorney General.
JEROME N. FRANK,
Counsel for the Federal Emergency Administrator of Public Works.

December 31, 1935.

United States District Court
West. Dist. of So. Car.
Dec. 31, 1935.
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

(534) **AMENDED ASSIGNMENT OF ERRORS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emeregncy Administrator of Public Works, Defendants.

Equity No. 451

On this 21st day of December, 1935, came the defendants, Greenwood County and E. L. Brooks, S. A.

Agnew and E. I. Davis, members of and constituting The Finance Board of Greenwood County, by Rupert F. Davis, W. H. Nicholson and D. W. Robinson, Jr., their Solicitors and say that the Report to Circuit Court of Appeals of Findings of Fact and Conclusions of Law pursuant to Order of Remand and the Decree of Injunction entered in the above cause on the 21st day of December, 1935, is erroneous and unjust to these defendants for the reasons set out in the original Assignment of Errors, dated December 31, 1935, record pages 593-592, and for the additional reason:

13. Because the Court erred in granting an injunction and refusing to dismiss the Bill; the error being that the Court should have held:

(a) That the plaintiffs have no standing in Court to maintain the Bill and

(b) That the Administrator of Public Works and Greenwood County had full constitutional and statutory authority to enter into the loan and grant agreement of November 30, 1935.

WHEREFORE Greenwood County and its Finance Board pray that the Decree herein be reversed and that the Bill of Complaint be dismissed and that these defendants have all other and further relief appropriate in the premises.

W. H. NICHOLSON,
RUPERT F. DAVIS,
ROBINSON & ROBINSON,
Attorneys for Greenwood County
and its Finance Board

December 31, 1935.

United States District Court
West. Dist. of So. Car.
Dec. 31, 1935.
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

(535) **AMENDED ASSIGNMENT OF ERRORS OF THE FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,
vs.
Greenwood County, et al, Defendants.
} Equity No. 451

Now comes the defendant, Harold L. Ickes, as Federal Emergency Adminstrator of Public Works and says that in the report of the Circuit Court of Appeals of findings of fact and conclusions of law pursuant to order of remand and decree of injunction filed in the above cause on the 21st day of December, 1935, there is manifest error, and for error he assigns the following:

The assignment of errors as set out on pages 596-598 of the Record, dated December 31, 1935; and for the additional reason:

17. Because the Court erred in granting an injunction and refusing to dismiss the Bill; the error being that the Court should have held:

(a) That the plaintiffs have no standing in Court to maintain the Bill; and

(b) That the Administrator of Public Works and Greenwood County had full constitutional and statutory authority to enter into the loan and grant agreement of November 30, 1935.

WHEREFORE, the defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, prays that the decree herein be reversed, and that the

Bill of Complaint be dismissed, and that said defendants have all other and further relief appropriate in the premises.

JAS. W. MORRIS,
Assistant Attorney General.
ALEXANDER HOLTZOFF,
Special Assistant to the Attorney General.
JOHN W. SCOTT,
Special Assistant to the Attorney General.
JEROME N. FRANK,
Counsel for the Federal Emergency Administrator of Public Works.

December 31, 1935.

CLERK'S COPY.

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY, PETITIONERS,

vs.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 10, 1937.

CERTIORARI GRANTED OCTOBER 25, 1937.

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VOLUME II

(536) **MANDATE.**

(Filed Jan. 12, 1937).

UNITED STATES OF AMERICA, ss:

The President of the United States of America,

To the Honorable the Judges of the District Court of the United States for the Western District of South Carolina,

(Seal of the Supreme Court of the United States)

GREETING:

WHEREAS, lately in the United States Circuit Court of Appeals for the Fourth Circuit, in a cause between Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Appellants, and Duke Power Company and Southern Public Utilities Company, Appellees, No. 4003, wherein the decree of the said Circuit Court of Appeals, entered in said cause on the 22nd day of February, A. D. 1936, is in the following words, viz:

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause, be, and the same is hereby, remanded to the District Court of the United States for the Western Dis-

trict of South Carolina, at Greenville, with directions to dismiss the bill in accordance with the opinion of the Court filed herein.

JOHN J. PARKER,
Senior Circuit Judge."

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of *certiorari*, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, the year of our Lord one thousand nine hundred and thirty-six, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here (537) ordered, adjudged, and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, reversed.

AND IT IS FURTHER ORDERED, That this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of South Carolina with directions to vacate its decrees and for further proceedings in conformity with the opinions of this Court.

December 14, 1936.

You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of *certiorari* notwithstanding.

WITNESS, the Honorable Charles E. Hughes, Chief Justice of the United States, the ninth day of Janu-

ary, in the year of our Lord one thousand nine hundred and thirty-seven.

CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court of the United States.

United States District Court
West. Dist. of So. Car.
Jan. 19, 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

(538) Copy.

ORDER PURSUANT TO MANDATE OF U. S. SUPREME COURT.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs, *vs.* Greenwood County, et al, Defendants.	Equity No. 451

NOW COME the said Duke Power Company and Southern Public Utilities Company, plaintiffs, by their attorneys, and Greenwood County and E. L. Brooks, S. A. Agnew, and E. I. Davis, as members of and constituting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, defendants, by their attorneys, and the mandate of the Supreme Court of the United States, duly authenticated under the seal of the said Supreme Court, and certified by the Clerk thereof, having been filed in this Court on January 12, 1937, whereby it appears that at the October Term 1936 of the said Supreme Court, on the 14th day of December, 1936, the said Supreme Court, by virtue of a writ of *certiorari* to the United States Circuit Court of Appeals, for the Fourth Circuit, reversed the decree of said United States Cir-

cuit Court of Appeals entered in this cause on the 22nd day of February, 1936, and ordered that the said cause be remanded to this court with directions to vacate the decrees entered herein on August 26, 1935, and on December 21, 1935, and for further proceedings in this (539) cause in conformity with the opinion of said Supreme Court;

NOW, THEREFORE, in pursuance of said mandate, it is Ordered, Adjudged and Decreed as follows:

1. That the said decrees of this court entered in this cause on August 26, 1935, and on December 21, 1935, be, and the same hereby are, vacated, to the end that further proceedings may be had herein in accordance with said mandate.

2. That the defendants be, and they hereby are, allowed three days from the date hereof within which to file supplemental answers, and that the plaintiffs be, and they are hereby allowed ten days thereafter within which to file replies to said supplemental answers.

3. That further proceedings be had herein in conformity with the opinion of said Supreme Court, and that the parties may apply, upon due notice, to this court for such other and further orders and directions as may be necessary.

This 19th day of January, 1937.

J. LYLES GLENN,
United States District Judge.

United States District Court
West. Dist. of So. Car.
Jan. 19 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

(540) Copy

SUPPLEMENTAL ANSWER.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works. Defendants.

The defendants, Greenwood County, E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board of Greenwood County, by way of supplemental answer to the amended and supplemental bill of complaint, aver:

1. That subsequent to the institution of this bill in equity, subsequent to the filing of the pleadings herein, subsequent to the taking of testimony and to the injunction order of the United States District Court of August 26, 1935, these defendants entered unto a superseding loan and grant agreement with the United States of America on the 30th day of November, 1935, a copy of which agreement is hereto attached and made a part of this supplemental answer. These defendants aver that this agreement, as shown by its terms, entirely supersedes the previous agreement of December 8, 1934 between Greenwood County and the United States of America.

2. That this agreement was authorized by a resolution of The Finance Board of Greenwood County and that thereafter The Finance Board adopted an initial

schedule of rates for the proposed project pursuant to
(541) the provisions of the statute law of the State of South Carolina.

WHEREFORE these defendants pray that their pleadings be supplemented in the manner set out herein, and that the bill of complaint be dismissed.

D. W. ROBINSON, JR.,
R. F. DAVIS,
W. H. NICHOLSON,
Attorneys for Greenwood County and The Finance Board of Greenwood County.

January 13th, 1937.

STATE OF SOUTH CAROLINA,
County of Richland:

E. I. Davis being first duly sworn, says: That he is one of the defendants in the above entitled action; that he has read the foregoing Supplemental Answer and the same is true of his own knowledge.

E. I. DAVIS.

Sworn to before me this 13th day of Jan. 1937.

CORNELIUS C. MILLER, L. S.
Notary Public for S. C.

Service accepted January 19th, 1937.

W. S. O'B. ROBINSON, JR.,
Atty. for Pltfs.

(542) Copy.

United States District Court
West. Dist. of So. Car.
Jan 19 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

SUPPLEMENTAL ANSWER.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works. Defendants.

The defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, by way of supplemental answer to the amended and supplemental bill of complaint, avers:

1. That subsequent to the institution of this bill in equity, subsequent to the filing of the pleadings herein, subsequent to the taking of testimony and to the injunction order of the United States District Court of August 26, 1935, the United States of America entered into a superseding loan and grant agreement with the other defendants herein on the 30th day of November, 1935, a copy of which agreement is attached and made a part of the supplemental answer of the other defendants herein. Defendant Harold L. Ickes avers that this agreement, as shown by its terms, entirely supersedes the previous agreement of December 8, 1934, between Greenwood County and the United States of America.

2. That this agreement was authorized by a resolution of The Finance Board of Greenwood County and that thereafter The Finance Board adopted an initial (543) schedule of rates for the proposed project, pursuant to the provisions of the statute law of the State of South Carolina, which schedule was the same as the schedule proposed to be put into effect by The Finance Board prior to the filing of its application with the Federal Emergency Administration of Public Works for the loan and grant.

WHEREFORE this defendant prays that his plead-

ings be supplemented in the manner set out herein, and that the bill of complaint be dismissed.

JOHN W. SCOTT,
Special Asst. to the Attorney General.
WILLIAM J. DEMPSEY,
Attorney for Harold L. Ickes as Federal Emergency Administrator of Public Works.

January .. 1937.

Service accepted January 19th, 1937.

W. S. O'B. ROBINSON, JR.,
Atty. for Plaintiffs.

United States District Court
West. Dist. of So. Car.
Jan 29 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

(544) **PLAINTIFFS' REPLY TO THE SUPPLEMENTAL ANSWERS OF THE DEFENDANTS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,
vs.
Greenwood County, et al, Defendants.
} In Equity

The plaintiffs, replying to the supplemental answers of the defendants filed herein on January 19th, 1937, allege:

It is admitted that while this cause was pending in the Circuit Court of Appeals for the Fourth Circuit on

appeal by defendants from the final decree of injunction entered herein on August 26, 1935, the defendants, Greenwood County and the Federal Emergency Administrator of Public Works, on November 30, 1935, entered into the contract to which the supplemental answers refer, and that on December 2, 1935, Greenwood County readopted the schedule of rates for the proposed hydroelectric project involved in this suit. But it is denied that said contract or the readoption of said rates worked any material change in the case or in the issues presented by plaintiffs' original and amended and supplemental bill of complaint filed herein and defendants' answers thereto, or in any way materially affected the proceedings herein which resulted in said final decree of injunction, which pleadings and proceedings as they appear and remain of record herein are by reference to said record made a part hereof. The changes made by the (545) substitution of said contract of November 30, 1935 for the prior contract of December 8, 1934 are matters of verbiage only leaving the loan and grant and the proposed project the same in character, purpose and effect, and subject to the same infirmities and objections, as alleged in said original and amended and supplemental bill of complaint, and as found and determined by this court in the proceedings herein resulting in said final decree of injunction. Except as herein expressly admitted the allegations of said supplemental answers, and of each of them, are denied.

WHEREFORE, plaintiffs pray that the original decree of injunction entered and filed herein be reinstated to the end that the defendants, and each of them, be permanently enjoined from constructing said Buzzard Roost project under and pursuant to said original contract of December 8, 1934, or under and pursuant to said new contract of November 30, 1935, or under and pursuant to any other form of contract whereby federal funds will be used for the purpose of constructing or operating said Buzzard Roost project, or any part thereof, and that they be given such other and further relief in the premises as the nature of the case, as shown by the proceedings had herein upon their original and their amended and supplemental bill of complaint and as made

by this reply, may require, and as to equity may seem meet.

NEWTON D. BAKER,
H. J. HAYNSWORTH,
W. R. PERKINS,
R. T. JACKSON,
J. H. MARION,
W. B. McQUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs.

(546) UNITED STATES OF AMERICA,
Western District of North Carolina,
Mecklenburg County.

Personally appeared before me N. A. Cocke, who being first duly sworn, deposes and says, that he is an Officer of Duke Power Company, one of the Plaintiffs named in the foregoing reply, to-wit, its Vice-President; that said plaintiff is a corporation as alleged in the original Bill of Complaint filed herein and he is duly authorized to make this affidavit for and on its behalf; that he has read the foregoing reply and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

N. A. COCKE.

Sworn to and subscribed before me, this the 27th day of January, 1937.

JAS. S. SEASE,
Notary Public.

Mecklenburg County, N. C.

My commission expires June 18, 1937.

UNITED STATES OF AMERICA,
Western District of North Carolina,
Mecklenburg County.

Personally appeared before me E. C. Marshall, who being first duly sworn, deposes and says that he is

an Officer of Southern Public Utilities Company, one of the plaintiffs named in the foregoing reply; to-wit, its President; that said plaintiff is a corporation as alleged in the original Bill of Complaint filed herein, and he is duly authorized to make this affidavit for and on its behalf; that he has read the foregoing reply and knows the contents thereof; that the same is true of his own knowledge, except as to the matter therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

E. C. MARSHALL.

Sworn to and subscribed before me, this the 27th day of January, 1937.

JAS. S. SEASE,
Notary Public.

Mecklenburg County, N. C.

My commission expires June 18, 1937.

I hereby accept service of plaintiffs' reply to the supplemental answers of the defendants, and acknowledge the receipt of a copy of said reply.

This January 29, 1937.

JOHN W. SCOTT,
Special Asst. to the Atty. General.
WILLIAM J. DEMPSEY,
Attorney for Harold L. Ickes, as Federal Emergency Administrator of Public Works.

I hereby accept service of plaintiffs' reply to the supplemental answers of the defendants, and acknowledge the receipt of a copy of said reply.

This January 29, 1937.

D. W. ROBINSON, JR.,
Attorney for Greenwood County and The Finance Board, etc.

(547) Copy.

United States District Court
West. Dist. of So. Car.
Feb 1 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

ORDER GRANTING PRELIMINARY INJUNCTION.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew, and E. I. Davis, Members of and consttiuting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

Equity No. 451

THIS CAUSE Came on to be heard at this term upon the motion of plaintiffs for a preliminary injunction and was heard upon the record herein, and after hearing counsel for the respective parties, it appearing to the Court that the issuance of a preliminary injunction is necessary to preserve the *status quo* pending the final determination of this cause by this Court, and to prevent irreparable injury to plaintiffs; it is, therefore,

ORDERED, ADJUDGED AND DECREED, that:

1. The defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, his attorneys, officers, agents, successors in office, and all persons acting in aid of them, and each of them, be, and they hereby are, restrained and enjoined during the pendency of this suit before this Court, and until the further order of this

Court, from in any manner aiding in the construction of the Buzzard Roost Project referred to and described in the original bill of complaint or any part of said project, except as hereinafter provided; and from advancing, (548) lending, granting, or paying over to Greenwood County, or to any officer, agent, or representative of said County, any funds whatsoever of the United States for the purpose of constructing, financing, or operating said Buzzard Roost project or any part thereof, or from otherwise appropriating or permitting to be used any federal funds in furtherance of said project, except that this order shall not be construed as preventing the payment of the legal, engineering and administrative expenses of the Public Works Administration.

2. The defendants, Greenwood County, E. L. Brooks, S. A. Agnew, and E. I. Davis, as members of and constituting the Finance Board for Greenwood County, and all other officers, agent, or representatives of said County, and their successors in office, and each of them, be, and they hereby are, restrained and enjoined during the pendency of this suit before this Court and until the further order of this Court, from receiving, accepting, or using, or permitting to be used, any funds of the United States for the purpose of constructing or operating said Buzzard Roost Project or any part thereof.

PROVIDED that the foregoing Order shall not prevent the payment to Greenwood County, and the receipt by it, of a sum not in excess of One Hundred Thousand ($100,000) for use by it in paying legal, engineering and other administrative expenses; such payments, receipts and expenditures to be without prejudice to the rights of any party. Any party may, upon notice to the other parties, apply to the Court for further orders and directions herein, including the right of the defendants to apply to the Court, upon due notice to plaintiffs, for a modification of this Order to permit the lending, granting, receipt and expenditure of funds for the purchase of necessary land should an emergency arise.

(549) PROVIDED FURTHER that the plaintiffs shall, within ten days from the date hereof, execute and file in this cause a Bond, payable to defendants, conditioned according to law, in the penalty of Fifty Thousand Dol-

lars ($50,000) and with a surety or sureties to be approved by the Court.

J. LYLES GLENN,
United States District Judge.

Rock Hill, South Carolina,

February 4, 1937.

Service accepted Febry. 1, 1937.

W. H. NICHOLSON,
D. W. ROBINSON, JR.,
Attys. for Greenwod County.

H. J. HAYNSWORTH,
W. S. O'B. ROBINSON, JR.,
et al.
Attorneys for Plaintiff.

WILLIAM J. DEMPSEY,
Atty. for Defendant, Harold L. Ickes.

United States District Court
West. Dist. of So. Car.
Jul 1 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

(550) **STATEMENT OF EVIDENCE UNDER EQUITY RULE NO. 75.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

In Equity.

Be it remembered that the above entitled cause came on for trial before the above Court sitting in equity on the 23rd day of February, 1937, pursuant to the mandate of the United States Supreme Court received and filed in the office of the Clerk of said Court January 12, 1937. W. S. O'B. Robinson, Jr., H. J. Haynsworth, C. F. Haynsworth, Jr., R. T. Jackson and W. B. McGuire, appeared as counsel for the plaintiffs. D. W. Robinson, Jr., W. H. Nicholson and R. F. Davis, appeared as counsel for the defendants, Greenwood County and its Finance Board, John W. Scott, William J. Dempsey and Robert E. Sher appeared as counsel for the defendant Harold L. Ickes, as Federal Emergency Administrator of Public Works.

The following proceedings were had:

Mr. D. W. Robinson, Jr. read the supplemental answer of defendant, Greenwood County. Mr. John W. Scott read the supplemental answer of the defendant, Harold L. Ickes. Mr. W. S. O'B. Robinson, Jr., read the reply of the plaintiffs.

The following stipulation, entered into by the parties, was presented to the court and read into the record.

STIPULATION.

It is herewith stipulated by counsel for the plaintiffs, counsel for Greenwood County and its Finance (551) Board and counsel for Harold L. Ickes, Administrator of Public Works:

I. It is the contention of plaintiffs that the evidence taken and reported herein by Wendell M. Walters, Special Master, pursuant to Order of Court dated April 29, 1935, and which is incorporated in the transcript of record as printed for the United States Circuit Court of Appeals, remains as a part of the record in the cause, that it need not be reintroduced and is not subject to any objection as to any part thereof, except as appears in the printed record. If, however, this position should be overruled by the Court, it is stipulated and agreed, without prejudice to plaintiffs' said position and any rights they may have in respect thereto, that at the trial

of this case before the Hon. J. Lyles Glenn, the plaintiffs shall be permitted to offer in evidence the testimony of any or all of the following witnesses as printed in the Transcript of Record for the United States Circuit Court of Appeals, to-wit: J. N. Stribling, J. E. Willoughby, E. C. Marshall, J. E. Sirrine, W. G. Perry, George Wrigley, C. P. Roberts, F. H. Cothran, W. D. Faucette, M. R. Kimbrell, J. M. Costello, and Charles S. Reed, as contained in the printed Transcript of Record, pages 157-264, 316-324. The plaintiffs are also to be permitted to offer in evidence the exhibits offered by them before said Special Master, to-wit, Exhibits 1-45. Any party may object to any part of this testimony or to any exhibit on any ground which would be available if the witness were present and testified in Court, except that no such objection shall be available, if the Court shall hold, as contended by plaintiffs, that said evidence remains as a part of the record of the case; and further that at the trial of this case before the Hon. J. Lyles Glenn, the defendants, or any of them, shall be permitted to offer in evidence the testimony of any or all of the following witnesses as printed in the Transcript of Record for the (552) United States Circuit Court of Appeals, to-wit: J. W. Barnwell, D. T. Duncan, G. R. Barksdale, F. R. Sweeny, J. G. Wardlaw, F. H. H. Calhoun, A. C. Bruce, Clarence E. Rose, W. A. Barnett, R. E. McCaslan, J. C. Smith, S. M. Leaman, J. H. Milford, M. G. Boyle, M. C. Willard, Emmett I. Davis and J. B. Sloan as contained in the printed Transcript of Record, pages 264-316. The defendants are also permitted to offer in evidence the exhibits offered by them before said Special Master, to-wit, Exhibits 1-66. Any party may object to any part of this testimony or to any exhibit on any ground which would be available if the witness were present and testifying in court, except that no such objection shall be available, if the Court shall hold, as contended by the plaintiffs, that said evidence remains as a part of the record of the case.

II. It is the contention of plaintiffs that the evidence taken before Judge Watkins at the hearing in Spartanburg, when the case was remanded by the Circuit Court of Appeals, did not become a part of the record and is not admissible as evidence for defendants. It is, however, stipulated and agreed that the witnesses

there examined would, if introduced on the trial before Judge Glenn, give the same testimony as they then gave as shown in the transcript of said testimony as made by Wendell M. Walters, who reported such hearing, and that said transcript of evidence may be used on the hearing before Judge Glenn as the deposition or testimony of said witnesses, with the right hereby reserved to any party to make any objection to the testimony of said witnesses, or to the admissibility of the exhibits then offered in evidence, on any ground and to the same effect as if said witnesses were present and testifying in Court on the hearing before Judge Glenn.

III. This stipulation and agreement shall not be taken or construed as waiving or affecting in any man-
(553) ner any right which plaintiffs, or any of the defendants, would otherwise have to introduce, or make use of any of the evidence herein referred to or any statement contained therein, or to introduce additional evidence, as if this stipulation and agreement had not been entered into.

(Signed by Counsel for the respective parties).

February 18th, 1937.

Mr. Robinson, Counsel for Plaintiffs: It is our position that the defendants here asked for the remand of this case on their motion, alleging that there had been a change in fact since the taking of the previous testimony and since the findings of the court, and it was upon that allegation of a supervening change that the case was sent back. The matter now before Your Honor is the question of the alleged supervening change in the facts since the decree, and the evidence now to be presented should relate to this subsequent change and not to the original issues.

The COURT: Well, I don't know about that, Mr. Robinson. It seems to me that the spirit underlying the Supreme Court's decision was to send the case back for amendment of pleading and then let the trial proceed normally *ad inito,* with the pleadings amended as the change in facts required and that then the case would come on before the District Court the second time for a

trial with the general rules governing the procedure applying to it, and in my thinking up to this point about the trial of this case I had contemplated that we would proceed in the normal way with the burden of proof being on the plaintiff and therefore entitled to open fully on the facts and the law and then the defendants would put in their testimony either by reference to the previous testimony like you would do and put in new witnesses and then you would of course be entitled to reply to it, just in a normal way.

As I read the Supreme Court's decision it seems to contemplate that the case when it comes back should be tried practically as a new case. Of course there are some legal questions that will come up during *cht* trial that I will have to rule on and on which I have an open mind and I want to hear arguments on both sides on them. I don't imagine there is going to be much precedent for a situation very much like this one, but it is a question of how far the previous decision of the Circuit Court of Appeals is the law of this case. For example, it is a question we are going to have to thrash out somewhere. But even with all of those questions in here, I think the Supreme Court seemed to indicate they thought the case ought to be tried practically anew, and if that is so, of course the normal way it would be tried would be for the plaintiffs to develop their case fully; then the defendants and then you would be entitled to reply. Now, if in the trial of the case in that way this question about the force and effect of the previous history of the case comes up, why then it is one of the legal questions this Court will have to rule on, as I take it. I rather think we ought to proceed to try the case in the normal way.

Mr. ROBINSON: Of course, I don't want to discuss any matter about which Your Honor has a firm opinion.

The COURT: I am rather firm in the view Mr. Robinson that we ought to proceed to try the case in the normal way.

Mr. ROBINSON: In order to present the question plaintiffs desire to file the following motion:

"Plaintiffs move the Court to hold and rule:

1. That the mandate of the Supreme Court does not require a rehearing of the issues raised by the original

(554) pleadings which were tried and determined by this Court prior to the entry of the original decree of injunction of August 26, 1935, or a review of the findings of this Court on said issues, except to the extent that this Court should find that said original findings have been displaced or otherwise materially affected by facts which may have supervened since the entry of said original decree of injunction.

2. That the retrial of the cause be restricted to the issues raised by the supplemental pleadings filed by the parties since the receipt of the mandate of the Supreme Court and pursuant to said mandate, which issues relate to the alleged supervening facts since the entry of said original decree of injunction.

Respectfully submitted.

H. J. HAYNSWORTH,
R. T. JACKSON,
W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs."

The COURT: You may hand it up to me. The motion will be denied.

Mr. ROBINSON: Plaintiffs would like to take an exception.

The COURT: Objection and exception taken and allowed.

Mr. ROBINSON: Now if your Honor please may I make this further statement that the plaintiffs in introducing their testimony do so subject to the position which they have taken in the motion. I do that because it is the position of the plaintiffs that no evidence bearing upon the original issues and which might have been introduced on the original hearing is now admissible, and of course by proceeding first as Your Honor has suggested we may appear to be waiving that position.

The COURT: I understand that you are not.

Mr. ROBINSON: Because in order to comply with (555) Your Honor's ruling we must put on any additional evidence which we have on the original issues.

The COURT: That is right.

(556) **PLAINTIFFS' EVIDENCE.**

C. S. REED, a witness for the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am still connected with the Duke Power Company in the same capacity in which I was connected when I testified before Mr. Walters, Special Master, in this case, in June, 1935, during the course of which testimony I described my connection with the Duke Power Company as being that of Director and gave my qualification as rate expert.

I have examined the new rate resolution of Greenwood County adopted December 2, 1935. The rates of the proposed Buzzard Roost Plant as set forth in that resolution are materially lower than the established rates for the Duke Power Company.

The rate resolution of The Finance Board contains three schedules, A, B, & C. Rate A covering the wholesale service to municipalities is approximately thirty per cent lower than the similar rates of Duke Power Company. Rate B covering service to industrial consumers is about twenty-one per cent lower than Duke Power Company's textile rate and about twenty-five per cent lower than Duke Power Company's rate to industrial consumers. Rate C covering service to rural consumers is twenty-six per cent lower than the Duke Power Company's residential rate, which is its rural rate.

Q. Now, Mr. Reed, if the Duke Power Company reduced its rates in Greenwood, Newberry and Laurens counties, in which the Buzzard Roost plant would operate, to the level of that plant so as to retain its customers and business in those counties, what effect would such a reduction have on the rates of the Duke Power Company in the remainder of the territory in which it operates?

MR. D. W. ROBINSON, JR., counsel for defendants: (557) That is a question of law on which this witness, we submit, is not competent to testify.

COURT: It looks to me like it is a question of fact.

Of course, you take the position that the statutes about discrimination would come into effect.

Mr. D. W. ROBINSON, JR.: I understand that would be a controlling factor.

Mr. W. S. O'B. ROBINSON, JR., counsel for plaintiffs: I am asking for the practical effect, as a matter of fact, aside from any question of legal discrimination.

COURT: I think the question as so limited is entirely proper.

Mr. SCOTT: Before ruling Defendant Ickes would like an objection.

COURT: All right, the Court rules the question as explained by Mr. Robinson is entirely proper and the witness is a witness who would probably know if anybody would and therefore it is entirely proper for him. Exception taken by both defendants and exception allowed.

A. (By Witness): We would necessarily have to make the same reduction not only in other parts of South Carolina in which the Duke Power Company operates, but also in those parts of North Carolina in which the company does business. The Duke Power Company's system has always maintained uniform rates.

COURT: As a matter of history over what period of years?

A. As far back as I have any recollection and as far back as I can find from the record. It has maintained uniform rates throughout the entire territory in which it operates and such uniformity is necessary.

Practically all the customers with whom the Buzzard Roost plant has made contracts for the sale of its output in Greenwood, Laurens and Newberry counties, are at present the customers of the Duke Power system and have been customers for a number of years. Also most of the customers of power listed by the Buzzard Roost plant as prospective customers, to whom the plant may be able to sell the rest of its output are customers now of Duke Power Company system and have been customers for a number of years. Those customers have expressed no dissatisfaction.

(558) They have made no complaint as to service and it is only because of the lower rates that the proposed plant has been able to take the customers away from us.

If the Duke Power Company reduced its rates in the Counties of Greenwood, Newberry and Laurens in order to retain its customers in those counties, it would have to make the same rates throughout the entire territory in which it operates. It could not maintain one set of rates in those three counties and higher rates in other parts of its territory for the same class of service.

Without regard to any question as to whether an attempt to reduce the rates in those three counties and at the same time to maintain the present rates in the remainder of the State of South Carolina would constitute a discrimination which would not be permitted as a matter of law, I ask you as a practical matter whether such a condition could exist? A. I don't believe it could, it would cause such dissatisfaction among the customers, such a loss of business and such a loss of good will that the company could not even attempt to maintain higher rates in some parts of its territory while reducing its rates in the three counties. Furthermore, if the Duke Power Company reduced its rates in those three counties, the project would be forced to likewise reduce its rates below the present level.

Objection by defendants to this testimony by the witness.

COURT: This is the opinion of a man who has studied rate questions over a long period of time and over a large area. I think the testimony is highly admissible.

Mr. SCOTT, attorney for the Administrator: We are not here trying a rate case.

COURT: Of course not; but one of the main contentions of plaintiffs is that what is being done by the Administrator here is unconstitutional because it is accom-
(559) plishing indirectly what the federal government or an agency of the federal government cannot do directly.

SCOTT: Of course we don't justify the acts of the Administration under the Commerce Clause.

COURT: So far as this particular question is concerned I am glad to have the benefit of this witness' opinion, but I think I have imagination enough to come to the same conclusion whether he testifies to it or not. If one utility is serving a given community and another utility comes in with a lower rate, the practical business man is going to buy at the cheaper rate. The fact that one utility is financed by private capital and the other by the government isn't going to keep him from buying at the lowest rate, especially when he is spending thousands of dollars per year for power. The testimony of this witness is that if the Greenwood County project charges lower rates it will pull the Duke rates down. On the other hand if the Duke Company should put in a rate lower than the project's rate, the project would have to put in a still lower rate.

The witness continued:

If the Duke Power Company did not reduce its rates to meet the competition of the Buzzard Roost plant, it would lose its business in the three counties, certainly to the extent that the output of the Buzzard Roost plant could supply the customers of Duke Power Company in those counties.

Q. Now, Mr. Reed, what other effect, if any, would the establishment of this plant and the lower rates charged by it for power have on the rates and business of the Duke Power Company if it did not immediately reduce its rates so as to try to hold the business. A. The lower rates of the Buzzard Roost plant apply to cotton mills, municipalities and other classes of service similar to the classes of service served by Duke Power Com-
(560) pany. If the mills, municipalities and other consumers of power in those three counties were given lower rates than the rates charged by Duke system for the same kind of service, there would be constant pressure brought to bear on the Duke system to reduce its rates to the level of the Buzzard Roost rate, and if it did not meet this demand it would seriously disturb the relationship between it and its customers and cause it to suffer constant loss of business.

COURT: You mean that is your opinion.

WITNESS: That is my opinion.

Mr. D. W. ROBINSON, JR.: I would like for you to strike that out as a question of opinion.

COURT: Motion overruled. If a man dealing with rates doesn't know out of his experience what the probable course of conduct would be, I think you might as well rule out all expert testimony. I think the testimony is entirely proper.

Mr. D. W. ROBINSON, JR.: Note the objection.

COURT: The testimony is objected to by both the defendants. Exception taken and allowed.

A. (Witness continuing.) For example, industries served by Duke Power Company are in close competition with the industries which would be served by the Buzzard Roost plant. The lower power costs of those served by the Buzzard Roost plant would give them a decided advantage in competing with similar industries served by Duke Power Company. The Duke Power Company would be faced with making material concessions to that demand that its rates meet the rates of the Buzzard Roost, and the lower rates of the project would be a controlling factor in forcing a reduction of the Duke rate.

If the Duke Power Company reduced its rates to the level of the rates of the Buzzard Roost plant, the effect would be that the net earnings of the company would be practically wiped out—that is leave nothing to pay bond interests or any return on the capital.

(561) I have examined the contract of December 8, 1934, between the County and Federal Government under which it was originally proposed to construct the plant; the new contract of November 30, 1935, under which the plant would now be constructed; the application of the County to the Public Works Administration; the application to the Federal Power Commission for a license; the original rate resolution adopted by Greenwood County in October, 1934; and also the new rate resolution adopted on December 2, 1935. The new rate resolution of December 2, 1935, adopts the same rates as those adopted by the original resolution of October,

1934. The new contract of November 30, 1935, and the new rate resolution of December 2, 1935, make no change in the rate or in the plant to be constructed. The construction of the plant under the new contract and its operation under the rate resolution of December 2, 1935, would have the same effect on the property and business of the Duke Power Company as if the plant had been constructed under the original contract of December 8, 1934, and operated under the original rate resolution of October, 1934.

CROSS EXAMINATION.

I am a Director of Duke Power Company. In 1934 our Company lost some large power consumers in the Town of Clinton, S. C.—the Clinton Mills, the Bailey Mill, and the Town of Clinton. Yes, I believe the mills built a steam plant and took from the Duke Company two cotton mills and the Town of Clinton. I believe the Town and the two mills used about 12,000,000 kilowatt hours of power a year. That is approximately the same amount of power for which the proposed Buzzard Roost plant has made tentative contracts with customers of the Duke Power Company. We did not lose a large number of large customers during the years of the depression in the Carolinas.

Some textile mills which were our customers have built steam plants of their own. I could get you the in-
(562) formation as to such mills but I haven't it with me.

Yes, since the loss of the Bailey Cotton Mills at Clinton the company has continued to do business. Yes, it has continued in Laurens County in which Clinton is located.

The last few years our sales have increased substantially. In 1936 the kilowatt hours sold were the highest in the records of the system—at least since 1929. The gross revenue for 1936 exceeded the gross revenue for any year since 1929. These facts are shown by the statements which the Company has furnished the defendants.

(The statement of Duke Power Company's sales in kilowatt hours and gross revenue was later introduced as Defendants' Ex. 90, attached hereto.)

The second list you hand me appears to be our output for the same years.

(Statement of Duke Power Company's kilowatt hour output for 1928-1936 was later introduced as Defendants' Ex. 91, attached hereto.)

The Duke Power Company is at the present time building an addition to its River Bend steamplant located in North Carolina between Gastonia and Charlotte. The Board of Directors, of which I am a member, authorized the building of one additional unit. The unit will produce several times the power of the Buzzard Roost plant, if the unit is run and not used as a standby unit; it may not produce anything; it will depend on the condition of the water. The capacity of the plant is 55,000 kilowatts as compared with 15,000 of Buzzard Roost. The plant is a standby and will act as an emergency unit for the entire Duke system. The system is all tied together. We can't trace individual kilowatt hours.

We have no protests of service from the customers I (563) referred to in my direct examination. I have no recollection of a protest from the Town of Greenwood as to rates or service. There may have been one, I don't know. There are a number of people they could protest to and I would not hear about, but generally, protests on rates would reach me—at least in recent years. I am not in charge of the service department of the Company, but I am acquainted in general with our service, and it is of excellent quality and we have very few complaints. If complaints as to service were serious I would hear about them.

At Greer the Duke Power Company has a distributing system in a municipality where there is also a municipal plant. No, we have not reduced our rates there. We have not had to reduce our rates by reason of that over the entire system. There is not much difference between the rates. I think our rates are lower than Greer's, but I am not sure. No, we have not had to reduce our rates on account of Mr. Bailey selling the Town of Clinton. No, we have not reduced our rates over the entire system specifically on account of the opening of that plant in Clinton in 1934. It would have to be taken into consideration in designing our rates.

Since November, 1933, the Duke Power Company has made reductions as follows: In September, 1934; in February, 1935; in March, 1936, and in November, 1936. The 1934 reduction was after conferences with and an order of the South Carolina Utilities Commission. These reductions have materially reduced the net earnings of the Company. The reductions had little to do with the increase in sales as there was no increase in revenue per customer.

The generation of power by the Duke Company increased approximately 380,000,000 kilowatt hours from 1935 to 1936. The Buzzard Roost plant would be a 15,000 kilowatt plant. I do not know the number of kilowatt hours it would produce. Assuming, as you do, it would produce 25,000,000 kilowatt hours the Duke increase in generation would be about 16 times that amount. So (564) far as kilowatt hours are concerned it is very small in proportion to the total increase.

As to whether, as a matter of fact, the development of the Greenwood County Project would materially hurt Duke Power Company, I would say that although it was very small in numerical ratio, about the same as a rat would bear to the steamship Normandie, if that rat is cholera infected it is of considerable importance to the ship. It is very small in actual quantity, but very large in potentiality.

Yes, I believe if Buzzard Roost is completed, its development will seriously damage Duke Power Company, not because of its size but because of its nature. The element connected with its nature that will damage Duke Power Company is that it is Government subsidized and unfair competition by reason of it paying no taxes. It can quote lower rates and that will act as a yardstick on all rates.

It is not usual for municipal plants, whether Government subsidized or not, to pay taxes. The quantity of the power which the Greenwood County project, if developed, would take away would not by itself in dollars and cents seriously damage the Company.

RE-DIRECT EXAMINATION.

Leaving out of account any injury and damage the Duke Power Company would sustain throughout the ter-

ritory in which it operates by reason of the reduced rates established by the Buzzard Roost plant, and confining myself to the loss of business in the three counties, this would be in excess of a quarter million dollars annually, if the Buzzard Roost plant sold the entire output to the present customers of the Power Company.

The municipal plant at Greer, S. C., was not constructed by means of a PWA loan and grant. It was constructed more than ten years ago and is a distribution system, purchasing its power from the Duke Power Company.

RE-CROSS EXAMINATION.

The $250,000.00 loss I spoke of would be in the gross income of Duke Power Company.

RE-DIRECT EXAMINATION.

But the loss in net income would be practically the same, as there would be very little reduction in expenses.

RE-CROSS EXAMINATION.

It is not true that if Duke sells power in addition to that sold last year, practically all the increase in our gross is net income, because additions in gross often en-
(565) tail considerable additional investment. For instance, we built about 1,500 miles of rural lines to get that additional gross last year. A reduction in gross does result in a reduced net.

COURT: The difference is plain, isn't it? What you are talking about is loss of gross income in a territory where you have already built your lines and are ready to operate and supply the power, whereas increase in gross in new territory is quite a different matter from the standpoint of your earnings, aren't they?

The WITNESS: It is, for the reason compare the 1929—

COURT: You already have your lines in the Greenwood area?

The WITNESS: We have.

COURT: That is the reason you say the loss of income there is very nearly the loss of net?

The WITNESS: It is.

COURT: Whereas if you built a new line into new territory, you would have to fund that investment over a period of years, maybe? Isn't that right?

(566) The WITNESS: We have made very substantial investments, for instance comparing the 1929 gross earnings.

COURT: Let's get that clear before we go any further. Suppose the same year that you lost $250,000 out of your Greenwood territory where you already have enormous investment, and it practically became useless and you built a half million dollar extension in some other territory, and even if you earned $250,000 gross there the earnings from that territory would have to be reduced until you paid for the investment made in new territory, isn't that right?

The WITNESS: It is.

The witness continued under cross examination of counsel:

Yes, if Greenwood sold its entire output in the Greenwood area we would probably have some business left because they couldn't get every customer. I don't think they could get our Piedmont & Northern Railway Company. If they sold their twenty-five million kilowatt hours I don't think that would be more than our total kilowatt sales. The total estimated gross revenue of the project is about $300,000.00 and we have a half million gross in that territory. The sale to the Piedmont & Northern Railroad was not included in that figure. There are some mills there that were not listed as prospects by the Buzzard Roost project. I do not know how many kilowatt hours we sold in Greenwood County not having the figure by counties.

(567) J. E. SIRRINE, a witness for the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I testified in this case before Mr. Walters, the Special Master, and at that time stated my qualifications as

hydraulic engineer. In addition I have had considerable experience, extending over more than forty years, with the textile industry in the Piedmont section of North and South Carolina where the Duke Power Company operates. I have acted as engineer for a large number of textile mills and have had experience in the operation of such mills, being an executive officer of several and a director of about twenty-three.

I have had occasion to study the question of power rates and power costs from the standpoint of the producer and seller of power and from the standpoint of the consumer and purchaser of power. Since 1902 I have been called in a great many times by textile mills to consider the question of power cost. In some cases by new mills—whether they should build a plant to generate their own power, or purchase it—and in some cases to consider whether mills should abandon plants already built and purchase power.

Q. Now, Mr. Sirrine, if the proposed Buzzard Roost plant should be constructed and should be operated in the three counties of Greenwood, Newberry and Laurens, at the rates set forth in the county's rate resolution of December 2, 1935, and assuming for the purpose of my question that those rates, so far as concerns wholesale service to municipalities, are approximately 30% lower than the established rates of the Duke Power Company, and so far as concerns the rates to textile mills are ap-
(568) proximately 21% lower than the corresponding rate of the Duke Power Company, and so far as concerns other industrial consumers are approximately 25% lower than the rate of the Duke Power Company, what in your opinion would, as a matter of fact, be the effect on the business and rates of the Duke Power Company in the entire Piedmont territory over which it operates?

Mr. D. W. Robinson, Jr., counsel for defendants: We interpose our objection on the ground that the witness is asked to give an opinion which will in its nature be speculative, and we submit that the conclusions to be drawn from established facts are for the court to make and not for the witness.

The Court: Well, here is a witness who has spent a number of years as an expert textile engineer.

Mr. D. W. ROBINSON, JR.: Will Your Honor allow us an exception.

The COURT: Yes, exception allowed.

A. The first effect would be the loss of whatever business they had, that the Buzzard Roost plant had capacity to sell. I do not know just what particular customers that would be but I do know as a practical matter that such of their customers as were in reach of Buzzard Roost and could be served by it would immediately undertake to get their power from that source because of the difference in rate. The indirect effect, which would in my mind be perhaps more serious, would be a disturbance of the present satisfactory relationship between Duke Power Company and its customers and the immediate demand by those customers for a reduction in rates. The textile business is highly competitive and the cost of power is an important element in their operations, running into a good deal of money annually. Each unit of the industry must of necessity keep its costs in line (569) with its competitor or it will have to operate at a reduced income or at a loss.

Take even a mill using as small an amount as 600,000 kilowatt hours a month, which is perhaps below the average in size, a reduction of the rate of 21% would mean more than $16,000 a year, which is an amount entirely too big for them to overlook. As to exactly how far that pressure would go and how it would be exerted nobody could say with absolute exactness, but it is obvious there would be a very determined drive to get the rates down. That would be the case almost immediately. If the argument that a lower rate was necessary for them to compete on equal terms wasn't sufficient to get their rates down to the competing rate, then they would begin with whatever other pressure they could exert. They wouldn't stop until they got something. Now it is almost certain that the Duke Power Company would have to make some concessions. As to whether the Company would have to go this low or not would depend on circumstances, but it would be under pressure constantly from every customer, whether he was in transmission distance of Buzzard Roost or not, to get his rates down, and I think it would extend to the whole system. As a

practical matter I think it would be utterly impossible for the Duke Power Company to reduce its rates to textile mills in the three Counties of Greenwood, Newberry and Laurens and not make reductions in other parts of the territory, because if they did, there would not only be a storm of protest raised but other methods would be resorted to to get the rates down.

Mr. SCOTT, counsel for defendants: We move *the* strike out the *witnesses* answer.

The COURT: I think it is perfectly proper testimony. The motion is denied and an exception allowed.

(570) The COURT: Give some of the reasons, Mr. Sirrine, on which you base the conclusion that it would be necessary for the plaintiffs to maintain practically the same rate.

The WITNESS: They are public utilities and have to treat all customers alike. If they did not the result would be a complete demoralization of the business not only for them but for their customers.

The steam plant put in by the mills in Clinton, S. C., was begun in the early part of 1933. Steam plants of that character were about 25% cheaper then than they are now.

In some cases where mills had use for process steam steam plants have been very profitable; in other cases they have been unprofitable. So much depends on the number of hours they run and on the price of coal that you have to judge every case by itself. In 1933 coal was cheaper. The cost of electrical energy an hour is not a constant thing. It depends entirely on the size of the load and load factor. Quite often one textile plant might handle it where another could not. A textile mill that operates regularly twenty-four hours a day would have a very great advantage in putting in a steam plant as compared with one that did not operate so long and with such regularity. If it should become established that textile mills generally could put in steam plants and reduce their power costs as compared with the rates of Duke Power Company, the Company would have to reduce its rates or go out of business. The steam plants then would serve as a very severe yardstick.

CROSS EXAMINATION.

Yes, if a number of textile mills in a community put in steam plants of their own, without any financing or (571) connection with either the State or Federal Governments and their generating costs lessened the costs of the power bought from Duke that situation would have the same effect on Duke Power Company as far as their business is concerned. I do not know that the installation of the steam plant by Mr. Bailey, at Clinton, and the taking away of two textile mills in the Town of Clinton from Duke has affected Duke's rates but it has affected its business. No, Mr. Bailey's plant would not affect Duke's business to the same extent as the Buzzard Roost plant. The Clinton Cotton Mills and Lydia Cotton Mills were building a plant to serve themselves. To that extent they don't have to pay any hydraulic tax; the extent to which they are serving outside customers is comparatively small and while it undoubtedly had an adverse effect in the loss of business, I don't think that the effect was so far reaching as this would be.

A substantial portion of that Clinton power is sold to the Town of Clinton. I do not know what the percentage is but it is not by any means half. I understand that the Town of Clinton and both of the cotton mills there were customers of Duke prior to the building of this plant.

I do not remember to what textile plants Greenwood County proposes to sell power, although I have seen the list of such mills. I do not know that Greenwood County has a contract with any textile mill. It was my understanding that it was offering power to textile mills. If the power is not sold to any textile mills but chiefly to the municipalities of Greenwood, Newberry and Laurens Counties, it would still have some effect on Duke's business because Duke Power Company has a great number of municipalities on their lines. The effect on their textile customers might not be so great but the effect on their municipal customers would be. I do not know what municipal customers Duke Power Company has, but I do know they have some.

(572) We were consulting engineers for a County project in Crisp County, Georgia, where the County was

building a plant to compete with an established utility.

We were employed by the Duke Power Company to make an appraisal of their property which was to be used for rate making purposes in hearings before the Utilities Commissions of the two Carolinas. The appraisals have never been used because the hearings have never taken place. During 1932, 1933 and 1934 the Duke Power Company was the biggest single client of our office.

Plaintiffs offered Public Works Order No. 83 as their Exhibit 46, Public Works Press Release No. 709 as their exhibit 47, Press Release 18366 as their exhibit 46, a letter of the Federal Emergency Administration of Public Works to the State Engineers dated November 8, 1933, as their exhibit 49. They also offered the deposition of Frank T. Post with the ten exhibits attached thereto. Plaintiffs' exhibits 46, 47, 48, 49 were produced by defendant Ickes pursuant to notice and order to produce and the authenticity of these documents was admitted by counsel for the defendant Ickes. Counsel for Greenwood County admitted the exhibits were correct copies of the original documents.

To each of these exhibits and to the deposition the defendants severally objected upon the following grounds:

Mr. D. W. ROBINSON, JR.: As to the press releases, Nos. 46, 47, 48, 49 we object to the introduction upon the ground that there is no proof as to who gave out the statement and there is no proof of the authority of the person giving out the statement, there is no proof that the statement is authentic; that the person issuing the statement was not offered as a witness in Greenwood County and we had no opportunity to cross examine him; that it is hearsay and not the best of admissible evidence, irrelevant, and it is not admissible as an admission against interests as far as Greenwood County is concerned. Upon the further ground, that the contract and dealings between the Public Works Administration and Greenwood County are set out in contract form, that that contract is plain upon its fact and needs no extraneous evidence to explain it.

In regard to the telegrams and letters contained

in the Post deposition, we object to the introduction of those papers and that deposition upon the same grounds stated above. We adopt also the grounds urged by the District Attorney in cross examination, as set out in the Post deposition. We object upon the ground that it relates to a project entirely distinct from Greenwood County; that some of those letters and telegrams are self-serving declarations from the Duke Power Company. Now, if your Honor please, those are my objections.

Mr. SCOTT: I don't want to unduly encumber the record, but that there may be no misunderstanding, let it show that the defendant Ickes, adopts the objection of Greenwood County, in addition to the ones previously made in regard to the evidence here before the Court.

Mr. JACKSON: I should like to make clear as to the exhibits numbered one to ten attached to the Post deposition; we offered those which were signed by Mr. Ickes or the Electric Power Board of Review just as we offered similar correspondence. The other matters were offered merely for the purpose of showing the continuity of the correspondence, and not as proof of the contents or the things stated therein.

COURT: I will admit exhibits 46 to 49 and the Post deposition with the 10 exhibits thereto attached. Plaintiffs' exhibits 46 through 49 and the Post Deposition with the Exhibits 1 to 10 attached thereto are admitted in evidence.

Defendants excepted to the rulings of the court as to the admissibility of each of these exhibits and the deposition. Exceptions are allowed.

Plaintiffs' Exhibit 46, Order No. 73, Federal Emergency Administration of Public Works, dated May 9th, 1934, Washington, D. C., entitled "Establishment Electric Power Board of Review," is as follows:

P. W. 11561

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

May 9, 1934—Washington, D. C.

Order No. 73

Establishment Electric Power Board of Review.

Effective May 9, 1934 the "Electric Power Board of Review" is established, membership, Henry T. Hunt, Morris L. Cooke, and Otto M. Rau.

It will be the duty of this Board to review disapprovals, and special conditions imposed, by any division of P.W.A. and to make recommendations to the Deputy Administrator with regard to applications of public bodies to finance the construction, repair, improvement or extension of electric power plant facilities.

The Technical Board of Review is instructed to refer to said Board, Henry T. Hunt, Chairman, Room 5139, (573) all such projects now pending before it on which it has not given notice of hearing.

The Projects Division is instructed to refer to Mr. Hunt summary report folders for such applications as have heretofore been and may hereafter be disapproved by any division or approved with any special conditions appearing on any divisional report.

The Electric Power Board of Review is directed to formulate and submit to the Administrator instructions for the guidance of the several divisions with regard to competitive situations and other controversial question affecting this class of projects.

HAROLD L. ICKES,
Administrator.

Plaintiffs' Exhibit 47, Press Release No. 709, Federal Emergency Administration of Public Works, announcing the establishment of the Electric Power Board of Review, is as follows:

P. W. 11780

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

PWA PRESS SECTION Release No. 709

Immediate Release

A Public Works Administration Electric Power Board of Review has been established Public Works Administrator Harold L. Ickes today announced.

This Board will be comprised of Henry T. Hunt, General Counsel of WPA, Morris L. Cooke, Chairman of the Mississippi Valley Committee, and Otto M. Rau, Counsellor for the Administrator. Mr. Cook is a Pennsylvania authority on Power development and Mr. Rau is a qualified expert on Utilities Costs and Operations.

It will be the duty of this Board to review the approval and special conditions imposed by any division of (574) PWA and to make recommendations to the Deputy Administrator with regard to applications of public bodies to finance the construction, repair improvement and extension of electrical power plant facilities.

Because of the wide variety of conditions under which such applications are made, the controversial nature of certain of the projects and the important economic factors involved in the general questions of power development, Administrator Ickes has decided such projects should receive the attention of the new Review Board comprised of men who have made detailed studies of the issues involved and who are fully informed on various developments in this field.

The Administrator ordered the Technical Board of Review and the Projects Division of PWA to refer such applications to the Electric Power Board of Review.

The Administrator directed the Power Board to formulate and submit instructions for the guidance of various PWA decisions with regard to controversial questions affecting this class of projects so that uniform policies and handling of these questions might be evolved.

Plaintiffs' Exhibit 48, P. W. 18366, entitled "President's Letter Creating National Power Committee" dated July 16, 1934; established "in the Public Works

Administration (of) a Committee called The National Power Policy Committee", with Secretary Ickes as Chairman of the Committee.

Plaintiffs' Exhibit 49 communication entitled "Federal Emergency Administration of Public Works To State Engineers", dated November 8, 1933, and signed H. M. Waite, Deputy Administrator; is as follows:

(575) FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

November 8 1933

To State Engineers:

A number of inquiries have come in to me regarding our attitude and procedure in regard to application for loan for municipal light plants. I have prepared the present letter to set forth my views.

It seems to me that we should do all in our power to prevent becoming embroiled in local political disputes. I think it is going a bit too far and creates an unnecessary amount of work to notify all of the utilities companies when a municipal utility application comes in. Isn't it a fact that when you hear one argument you hear all of them? In principle they are the same. After all, the question for you to decide is one of whether or not it is engineeringly economically and socially sound.

The entire procedure of the utilities company is one of delay. You find this everywhere. We are most anxious to set up around the country sound publicly owned utilities as yard-sticks to determine the principle of whether or not communities can satisfy themselves and give lowered rates of electricity.

Where you do find it necessary to have a hearing, both sides, of course, should be present. I cannot see why it is necessary for the utilities to get into the whole file. If you do this, you immediately get into a three-cornered engineering discussion, the utilities, the applicant and ourselves. As far as the engineering is concerned, I don't think it is any of the utilities' business. Your engineering force, together with the engineering which has been done by the applicant and which will be checked here, is sufficient.

(576) If the utility desires to file a brief or be heard, and you decide it is necessary and advisable to do so, you can give them enough of the facts on which they can prepare their brief.

H. M. WAITE,
Deputy Administrator.

PW 1073

(577) FRANK T. POST, whose deposition was duly taken pursuant to notice properly served, and duly returned to the Court, testified as follows:

DIRECT EXAMINATION.

I live at Spokane, Wash., and am President of the Washington Water Power Company, having held this office for six years last past. I served as attorney for this company from December, 1909, until August, 1930, during which time I was Vice-President for a while.

The Washington Water Power Company is a public utility company, its *principle* business being the generation and sale of electric energy in eastern Washington and northern Idaho. It serves some 20 odd counties in the two states and also owns a few water systems.

It serves Coeur d'Alene, Idaho, a City of about 8,000 people.

The City of Coeur d'Alene made an application to the Public Works Administration for a loan and grant. The ordinance authorizing the application was passed by the City Council on November 2, 1933. I have a certified copy of the ordinance. The bond issue which the ordinance authorized were general obligation municipal coupon bonds in the principal amount of $300,000.00, and the City was authorized to incur a municipal indebtedness in that amount for the purpose of acquiring by purchase or construction a light and power plant for the City.

(The ordinance was introduced and admitted in evidence as Post Exhibit No. 1, the material parts of said exhibit being hereto attached.)

In pursuance of this ordinance authorizing general obligation municipal coupon bonds for $300,000.00, the

(578) City of Coeur d'Alene in December, 1933, made application to the Public Works Administration for a loan and grant. Our company filed a protest. No official action in Washington was taken until after the expiration of many months and until on or about November or December, 1934.

I had an exchange of telegrams and letters with Mr. Ickes, Public Works Administrator, about the matter, and I have with me either the originals or copies of the letters and telegrams.

The first is a telegram dated November 7, 1934, which I sent to Secretary Ickes. A copy of this telegram was introduced and admitted in evidence as Post Exhibit No. 2, which is hereto attached.

I received a reply to that telegram from Harold L. Ickes, Administrator. I have with me the original which I received from the telegraph company.

This telegram was admitted in evidence as Post Exhibit No. 3 and reads as follows:

C47 58 GOVT-G WASHINGTON DC 12 630P

F T POST
PRESIDENT THE WASHINGTON WATER POWER CO SPOKANE WASHN-

RETEL SEVENTH DOCKET 6695 COEUR-DALENE CITYS PROPOSED ELECTRIC RATES CONTEMPLATE TWENTY PERCENT REDUCTION STOP PROPOSED WATER DEEMED BETTER QUALITY THAN YOURS STOP YOU HAVE ALREADY HAD OPPORTUNITY MEET CITYS PROPOSALS HOWEVER IF YOUR COMPANY PLACES IN EFFECT RATE REDUCTION EQUAL OR GREATER THAN THAT OF CITY ELECTRIC POWER BOARD OF REVIEW WILL CONSIDER MATTER FURTHER

HAROLD L. ICKES ADMINISTRATOR

These telegrams were all set up in the complaint in the case of Washington Water Power Company against Officers of the City of Coeur d'Alene and Mr. Ickes and are admitted by the answer.

I replied to Mr. Ickes' telegram of November 12, 1934 (Exhibit No. 3), by telegram dated November 15, 1934, a carbon copy of which I produce. This carbon original (579) was introduced in evidence as Post Exhibit No. 4, copy of which is hereto attached.

In reply to my telegraph of November 15, 1934, to Mr. Ickes (Exhibit No. 4), I received a telegram dated November 17, 1934, signed by Mr. H. T. Hunt, Chairman of the Electric Power Board of Review, for the Administrator. Mr. Hunt was Chairman of that Board and was also attorney for Mr. Ickes as Administrator of the Public Works Administration and appeared as such in our litigation. I have with me the original telegram received from Mr. Hunt. This telegram was admitted in evidence as Post Exhibit No. 5 and reads as follows:

WESTERN UNION

SKI 13 GOVT f WASHINGTON DC 149 P NOV 17 1934

F T POST, Pres—THE WASHINGTON WATER POWER CO

RETEL ADDRESSED ICKES WILL CONSIDER POINTS AND WILL ADVISE CITY OFFICIALS OUR CONCLUSIONS

H T HUNT
CHAIRMAN ELEC POWER BOARD REVIEW FOR THE ADM.

1127A

Later I received in due course of mail a letter from Mr. Hunt dated November 26, 1934, the original of which I produce.

This letter was admitted in evidence as Post Exhibit No. 6 and reads as follows:

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS
ELECTRIC POWER BOARD OF REVIEW

WASHINGTON, D. C.
November 26, 1934.

Mr. F. T. Post,
President,
The Washington Water Power Company,
Spokane, Washington.

Dear Sir:

Your telegram of November 15 addressed to the Administrator, relative to the Coeur d'Alene, Idaho, pro-
(580) ject, Docket No. 6695, has been referred to me for reply.

You state that the original application contains no proposal of a reduction in rates. However, Mayor Coe conferred here with Mr. O. M. Rau of this Board and with me, and we advised him that a substantial reduction in rates would be required. The loan agreement with the City will contain a condition that the City adopt a rate ordinance satisfactory to the Administrator and no funds will be supplied for construction of the project unless such an ordinance is adopted. To be sure that there will be no misunderstanding in this matter I have written to Mayor Coe the letter dated November 21, of which copy is enclosed.

You state also that the plant will not cover the entire city. We have found, however, that the plant as described in the applications covers all consumers within the city limits exclusive of large industrial consumers now served by your company.

You refer to taxes paid by the utility, the loss of which is not taken into consideration. The project indicates income over and above operating costs and debt service charges to average in excess of $24,000 during the period of this loan, with 80% of the existing consumers served by the proposed municipal plant. The income available for general fund purposes after the loan is liquidated compensates amply for loss of taxes from the utility.

With regard to the present and proposed water sys-

tems, the record is quite clear that the existing system of your company is a source of complaint by the community, and it is a condition precedent in the loan agreement that the City "prove to the satisfaction of the State Engineer that the proposed source of water supply is suitable, both as to quantity and quality of water".

Very truly yours,

HENRY T. HUNT,
Chairman for the Administrator.

There was an inclosure with the letter of November 26 which I received from Mr. Hunt. The inclosure is a letter dated November 21, 1934, from Mr. Hunt, Chairman for the Administrator, to Mr. John Knox Coe, Mayor of Coeur d'Alene. I also find in my file an original telegram from Mr. Hunt to John P. Gray, our attorney in the litigation.

The letter from Mr. Hunt to Mr. Coe, Mayor of Couer d'Alene, dated November 21, 1934, was admitted in evidence as Post Exhibit No. 8 and is as follows:

Legal—WLG:dn docket 6695

AIR MAIL November 21, 1934.

(581) Honorable John Knox Coe,
Mayor,
Coeur D'Alene, Idaho.

Dear Mr. Mayor:
I have today sent to you the following telegram:

"REDOCKET SIXTYSIX NINETYFIVE RATE ORDINANCE REQUIRED AS CONDITION OF LOAN SHOULD FIX RATES APPROXIMATELY TWENTY PER CENT BELOW EXISTING RATES STOP AIRMAIL LETTER FOLLOWS."

The ordinance should state that the rates therein will be made available by the municipal plant and will not be increased unless and until it is proved to the

satisfaction of the Administrator that the said rates are insufficient to provide for operating expenses, necessary improvements and extensions, and so much of the debt service as is represented by the proportion which the cost of the electric system bears to the cost of the entire project. It should provide also that the charges to the City itself for street lighting and other municipal services shall not exceed the rates for such service now provided by schedules of the Washington Water Power Company until it shall be ascertained that such rates are less than the cost of service to the City. The ordidance should recite that the agreement of the City to maintain such rates and charges as aforesaid is in further consideration of the grant from the Government and is for the benefit of the electric consumers and taxpayers of the City.

It will be necessary that the ordinance be approved by the Administrator. This can be done either before or after its adoption.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator.

A copy of this letter (Exhibit No. 8) was also given me by Mr. Coe, Mayor of Coeur d'Alene.

I have here a copy of the contract between the City of Coeur d'Alene and the Public Works Administration. The contract was produced and introduced in evidence as Post Exhibit No. 10, the material parts of which are hereto attached.

CROSS EXAMINATION.

(582) By Mr. CASTERLIN:

I am not connected in any way either directly or indirectly with the Duke Power Company or the Southern Public Utilities Company. I own no stock in either of those companies nor does the Washington Water Power Company. As far as I know the Washington Water Power Company has no relation with either one of those companies.

FRANK T. POST.

These exhibits marked Post Exhibits Nos. 1 to 10 do not pertain to any litigation between the Duke Power and Southern Public Utilities Company as plaintiffs and Greenwood County and others as defendants. These Exhibits pertain to the Washington Water Power Company and the City of Coeur d'Alene and the controversy between them. That suit or controversy was entirely independent of the suit between the plaintiffs and defendants in this action in which this deposition is taken.

The first communication I received in reference to taking this deposition was subsequent to the determination of the case of the Washington Water Power Company against the City of Coeur d'Alene.

Mr. CASTERLIN: I move to strike the entire deposition of the witness Frank T. Post and all the testimony which he has given in this deposition on the grounds that it is all incompetent, immaterial and irrelevant; it does not pertain to any of the issues in the instant action; does not tend to prove or disprove any of the matters involved in the instant action and all of the testimony pertains to a collateral matter to a separate suit which has no relation directly or indirectly with the instant action. I believe that is all.

(583) PLAINTIFFS' EXHIBIT MARKED POST EXHIBIT NO. 1.

This exhibit is being transmitted to the Circuit Court of Appeals, the material parts being as follows:

"BE IT ORDAINED by the mayor and City Council of the City of Coeur d'Alene, Kootenai County, Idaho:

Section 1. That the City of Coeur d'Alene, Idaho shall issue its general obligation municipal coupon bonds in the principal amount of $300,000.00 and incur a municipal indebtedness in said amount for the purpose of acquiring by purchase or construction a light and power plant for said City, also including plant site, transmission and distribution lines and the necessary rights of way for the same."

(584) PLAINTIFFS' EXHIBIT MARKED POST EXHIBIT NO. 2.

"POSTAL TELEGRAPH

Spokane, Washington
November 7, 1934

HON. HAROLD L. ICKES,
PUBLIC WORKS ADMINISTRATOR
WASHINGTON D C

CONGRESSMAN WHITE OF IDAHO HAS RECENTLY STATED PUBLICLY THAT PUBLIC WORKS ADMINISTRATION HAS APPROVED APPLICATION CITY OF COEUR DALENE IDAHO FOR LOAN AND GRANT TO BE USED FOR CONSTRUCTION DIESEL ENGINE ELECTRIC GENERATING PLANT AND DISTRIBUTION SYSTEM IN COMPETITION WITH OUR EFFICIENT HYDRO SYSTEM STOP FEEL SURE THIS APPLICATION HAS NOT BEEN CALLED TO YOUR ATTENTION BECAUSE ITS APPROVAL WOULD VIOLATE STATEMENT OF PRINCIPLES CONTAINED IN PUBLIC WORKS ADMINISTRATION PRESS RELEASE NUMBER NINE EIGHTY NINE DATED SEPTEMBER TWENTY SEVENTH NINETEEN THIRTY FOUR STOP OUR PRESENT RATES IN COEUR DALENE ARE AMONG THE LOWEST IN THE UNITED STATES AND REGULATED BY IDAHO PUBLIC UTILITIES COMMISSION STOP APPLICATION OF THE CITY OF COEUR DALENE FOR LOAN AND GRANT WHICH WE HAD AN OPPORTUNITY TO ANSWER DOES NOT CONTAIN ANY SCHEDULE OF RATES WHICH CITY PURPOSES TO PUT IN FORCE IF PWA SHALL LOAN AND GIVE IT MONEY WITH WHICH TO BUILD A SYSTEM TO OPERATE IN COMPETITION WITH OUR COMPANY THEREIN STOP WE HAVE NEVER SEEN ANY SCHEDULE OF RATES PROPOSED BY THE CITY AND IT IS IMPOSSIBLE FOR THE CITY TO MAKE THIS PROPOSED PROJECT SELF-LIQUIDATING UNDER SCHEDULES OF RATES LOWER THAN OURS STOP CONSTRUC-

TION OF DIESEL ENGINE PLANT IN COEUR DALENE AT THIS TIME WOULD SEEM TO VIOLATE ALL THE PRINCIPLES CONTAINED IN YOUR PRESS RELEASE AND IN OTHER RELEASES OF THE PWA NOT ONLY BECAUSE OF THE SITUATION OUTLINED ABOVE BUT ALSO BECAUSE THERE IS AT THE PRESENT TIME (585) IN THIS TERRITORY A LARGE SURPLUS OF HYDRO GENERATED ELECTRICAL ENERGY WHICH WILL BE GREATLY AUGMENTED BY THE GOVERNMENT THROUGH THE GRAND COULEE DEVELOPMENT STOP FEEL SURE YOU HAVE NO INTENTION TO DEPART FROM PREVIOUSLY ANNOUNCED POLICIES AND THAT COEUR DALENE APPLICATION WILL NOT BE GRANTED STOP SHALL GREATLY APPRECIATE ASSURANCE THAT THIS SITUATION WILL BE GIVEN YOUR PERSONAL ATTENTION AND I WILL ESTEEM IT A PRIVILEGE TO HAVE THE OPPORTUNITY OF A PERSONAL INTERVIEW AND DISCUSSION OF WHOLE PROBLEM WITH YOU.

F T POST PRESIDENT
THE WASHINGTON WATER POWER COMPANY"

(586) PLAINTIFFS' EXHIBIT MARKED POST EXHIBIT NO. 4.

"SPOKANE WASHINGTON
NOVEMBER 15, 1934

HON. HAROLD L. ICKES
PUBLIC WORKS ADMINISTRATOR
WASHINGTON D C

RETEL TWELFTH DOCKET SIX SIX NINE FIVE COEUR D'ALENE IN THE COMPAIGN BEFORE THE ELECTION AUTHORIZING BOND ISSUE IT WAS NOT ASSERTED BY THE CITY OFFICIALS OR OTHER PROPONENTS THAT IF THE CITY SHOULD BE AUTHORIZED TO GO

INTO THE ELECTRIC BUSINESS THERE WOULD BE ANY LOWERING OF RATES STOP IT MAY SEEM STRANGE TO YOU BUT THE FACT IS THAT CITY OFFICIALS OF COEUR DALENE AT A MEETING WITH THE PUBLIC UTILITIES COMMISSION OF IDAHO STATED TO THAT COMMISSION IN MY PRESENCE THAT THEY WERE NOT INTERESTED IN ANY REDUCTION IN ELECTRIC RATES BUT ONLY IN MUNICIPAL OWNERSHIP STOP THE ORIGINAL PAPERS FILED BY COEUR DALENE WITH YOUR DEPARTMENT FOR A LOAN AND GRANT DID NOT CONTAIN ANY OFFER OR PROPOSAL THAT THERE WOULD FOLLOW ANY REDUCTION IN ELECTRIC RATES STOP WE WERE GIVEN A COPY OF THIS APPLICATION AND ANSWERED IT IN ACCORDANCE WITH ITS TERMS STOP SEVERAL WEEKS AFTER THE IDAHO LOCAL BOARD HAD MADE A REPORT TO WASHINGTON MISTER COE THE MAYOR OF COEUR DALENE WENT TO WASHINGTON AND HAD A CONFERENCE WITH SOMEONE UNKNOWN TO US STOP WE ARE NOT ADVISED AS TO WHAT HE SAID AND WE HAVE NO COPY OF ANY DOCUMENT OR PAPER IF ANY FILED BY HIM STOP YESTERDAY WE COMMUNICATED WITH MAYOR COE AND HE SAYS THAT HE FILED NO WRITING ON THAT SUBJECT AND THAT HE DID HAVE SOME CONVERSATION WITH SOME PARTY WHOSE NAME HE REFUSES TO GIVE US AND THAT WHAT WAS SAID ABOUT REDUCTION OF RATES HE STATES HE DOES NOT REMEMBER STOP MAYOR COE HAD NO AUTHORITY FROM THE CITY GOVERNMENTTO MAKE ANYREPRESENTATION OR PROPOSAL ON THAT SUBJECT STOP WE THINK IT IS ONLY FAIR THAT WE SHOULD HAVE A COPY OF ANY WRITING OR MEMORANDUM IF ANY (587) NOW IN THIS FILE WHICH RELATES TO ANY SUGGESTION OR PROPOSAL FOR A REDUCTION IN RATES STOP AS PERTINENT TO THIS SUBJECT WE FURTHER SUGGEST THE FOLLOWING FACTS NAMELY OF THE GROSS ELECTRIC REVENUE RECEIVED BY OUR COMPANY FROM ELECTRIC SERVICE RENDERED IN THE

STATE OF IDAHO OVER EIGHTEEN PER CENT IS PAID BACK TO THE PEOPLE IN THE FORM OF FEDERAL STATE COUNTY CITY AND OTHER TAXES STOP THE MUNICIPALISTS DO NOT PROPOSE TO PAY ANY TAXES TO THE FEDERAL GOVERNMENT NOR ANY STATE COUNTY OR SCHOOL DISTRICT TAXES OR ANY MONEYS IN LIEU THEREOF STOP WHAT THEY MAY DO IN THE MATTER OF CITY BOOKKEEPING IN THE WAY OF SHIFTING FROM ONE FUND TO ANOTHER IS PURELY A MATTER OF SPECULATION STOP THE PROPOSED MUNICIPAL PLANT DOES NOT COVER THE ENTIRE CITY BUT DELIBERATELY ADMITS NOT ONLY A PORTION THEREOF WITHIN THE CITY LIMITS BUT ALSO A PORTION THEREOF JUST OUTSIDE OF THE CITY LIMITS IN WHICH SECTIONS WE HAVE OVER THREE HUNDRED ELECTRIC CUSTOMERS STOP IN OTHER WORDS THE MUNICIPALISTS SEEK TO CORRAL THE BEST PART OF THE BUSINESS AND LEAVE THE POOREST PART TO THIS COMPANY STOP EVEN THIS PROPOSED PLANT CANNOT BE BUILT WITH THE AMOUNT OF MONEY ASKED FOR AND TO CREATE A PLANT OR A SYSTEM WHICH WOULD COVER THE ENTIRE TERRITORY WOULD MATERIALLY INCREASE THE SHORTAGE STOP THIS SECTION OF THE NORTHWEST HAS BEEN WIDELY ADVERTISED FOR ITS WATER POWER DEVELOPMENTS AND POTENTIAL DEVELOPMENTS STOP THIS COMPANY HAS SIX HYDRO PLANTS ON THE SPOKANE RIVER ONE OF THEM BEING ONLY TEN MILES FROM COEUR DALENE STOP THE FEDERAL GOVERNMENT IS SPENDING MANY MILLIONS IN DEVELOPING TWO HYDRO PLANTS IN THE COLUMBIA RIVER STOP THE CONTRACTORS FOR THE GRAND COULEE DAM WHO CERTAINLY KNOW THEIR BUSINESS HAVE BUILT A TRANSMISSION LINE FROM THE DAM SITE TO COULEE CITY AND ENTERED INTO A FIRM CONTRACT WITH THIS COMPANY FOR ALL OF THE ELECTRIC POWER NEEDED IN THAT ENTERPRISE STOP THERE CAN BE NO DOUBT THAT THESE CONTRACTORS KNEW

ALL ABOUT DIESEL ENGINE PLANTS STOP THAT UNDER THESE CIRCUMSTANCES A BUREAU OR BOARD OF THE FEDERAL GOVERNMENT SHOULD SERIOUSLY CONSIDER A PRO-
(588) POSAL TO FINANCE AND SUBSIDIZE A DIESEL ENGINE ELECTRIC SYSTEM IN COEUR DALENE IS MOST SURPRISING STOP THE RATES OF OUR COMPANY PREVAILING IN THIS SECTION ARE AMONG THE LOWEST IN THE UNITED STATES AND WERE SO DETERMINED BY INVESTIGATORS FOR THE FEDERAL TRADE COMMISSION STOP PURSUANT TO ORDER OF DEPARTMENT OF PUBLIC WORKS OF THE STATE OF WASHINGTON THIS COMPANY HAS BEEN DILIGENTLY ENGAGED FOR SEVERAL MONTHS IN MAKING A COMPLETE DETAILED INVENTORY OF ALL OF ITS PROPERTY IN THE STATES OF WASHINGTON AND IDAHO STOP THIS INVENTORY IS NOW COMPLETED AND IS BEING CHECKED BY ENGINEERS AND OTHER EMPLOYES OF SAID DEPARTMENT STOP IN THE NEAR FUTURE A TRIAL OR HEARING WILL BE HAD BEFORE SAID DEPARTMENT IN WHICH WE EXPECT THE PUBLIC UTILITIES COMMISSION OF IDAHO WILL PARTICUPATE TO DETERMINE THE FAIR VALUE OF ALL OF THE ELECTRIC PROPERTY OF THIS COMPANY AND ALSO TO DETERMINE THE REASONABLENESS OF ALL RATE SCHEDULES STOP THE RATE SCHEDULES IN EACH STATE FOR COMPARABLE CITIES TOWNS AND COMMUNITIES AND FOR AGRICULTURAL SERVICE MUST OF NECESSITY BE SUBSTANTIALLY THE SAME STOP OUR COMPANY IS CONTROLLED BY STATE LAWS AND BY ADMINISTRATIVE AND JUDICIAL BODIES CREATED BY STATE LEGISLATURES STOP THE LAW PROVIDES THAT ITS RATES SHALL BE FAIR JUST REASONABLE ADEQUATE AND NON DISCRIMINATORY AND THERE ARE SEVERE PENALTIES FOR VIOLATIONS THEREOF STOP OUR COMPANY OF COURSE CANNOT MAKE ANY BINDING CONTRACTS WHICH MIGHT ATTEMPT TO OVERRIDE OR USURP THE FUNCTIONS OF STATE REGULATORY BODIES STOP

FRANK T. POST.

WE ARE ADVISED BY OUR LAWYERS THAT THE PUBLIC WORKS ADMINISTRATOR HAS NO POWER OR AUTHORITY UNDER THE LAW TO MAKE ANY LOAN OR GRANT TO COEUR DALENE FOR THE PURPOSE OF CONSTRUCTING A DIESEL ENGINE ELECTRIC SYSTEM STOP WE MAKE THIS STATEMENT FOR THE PURPOSE OF NOT WAIVING THIS POINT IN ANY LITIGATION THAT MAY ENSUE HEREAFTER IF THERE SHOULD BE ANY SUCH LITIGATION STOP AS TO THE CONTENTION IN THE MATTER OF THE WATER SYSTEM THAT THE PROPOSED WATER IS DEEMED OF BETTER QUALITY THAN (589) THE WATER THAT IS FURNISHED BY US FROM THAT GREAT AND BEAUTIFUL LAKE WE BEG TO STATE THAT THE RECORD IN YOUR FILES WILL SHOW THAT THE PROPONENTS DO NOT KNOW WHERE THEY CAN GET THIS BETTER QUALITY OF WATER STOP THE SUGGESTION SEEMS TO BE THAT THEY MAY SINK ONE OR SEVERAL WELLS BUT HOW MANY AND WHERE AND THE QUANTITY AND QUALITY OF WATER OBTAINED THEREFROM IS PURELY SPECULATIVE STOP THE WATER FROM THE LAKE FURNISHED BY OUR COMPANY HAS BEEN HELD TO BE WHOLESOME AND POTABLE IN ACCORDANCE WITH THE STANDARDS OF THE UNITED STATES BUREAU OF HEALTH STOP PERMIT ME TO POINT OUT IN CONCLUSION THAT IF THE CITY OF COEUR DALENE SHOULD CONSTRUCT AND OPERATE THE PROPOSED SYSTEMS IN COMPETITION WITH OUR COMPANY THE INEVITABLE RESULT WILL BE THAT EACH SYSTEM WILL LOSE MONEY AND THAT THE CITY OF COEUR DALENE NOW IN A PRECARIOUS FINANCIAL SITUATION WILL BECOME BANKRUPT.

F. T. POST PRESIDENT
THE WASHINGTON WATER POWER COMPANY

FTP-W
POSTAL
CHG WWP CO''

(590) PLAINTIFFS' EXHIBIT MARKED F. T. POST EXHIBIT 10.

This Exhibit is being transmitted to the Circuit Court of Appeals, the material parts being as follows:

"Loan and Grant Agreement
between the
City of Coeur d'Alene
Kootenai County, Idaho
and the
United States of America
P. W. A. Docket No. 6695

(f) *Security*: General obligations of the Borrower payable as to both principal and interest from *ad valorem* taxes which may be levied without limit as to rate or amount upon all the taxable property within the territorial limits of the Borrower.

23. *Conditions Precedent to the Government's Obligations.* The Government shall be under no obligation to pay for any of the Bonds or to make any grant:

(i) Unless and until the Borrower shall adopt a rate and bond ordinance, satisfactory to the Administrator, in form, sufficiency and substance.

(591) EDWIN VENNARD, a witness for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

My home is Evanston, Ill. I am by profession an engineer. I am in charge of the rate department of the Middle West Service Company, in Chicago. Before I went with the Middle West Service Co. as rate expert in 1933, I was in charge of the rates of one of the operating subsidiaries. The Middle West Service Co. renders a utility service to the operating companies in which the Middle West Corporation is interested. About thirty operating companies located throughout the Middle West are serviced by our company.

Numerous applications for PWA loans and grants were made by municipalities served by the operating

companies for which I acted as rate expert. I handled such matters for the operating companies, as rates were involved. In handling the matters of these applications for PWA loans and grants, from the standpoint of the companies, I conferred with representatives of the Public Works Administration in Washington—Mr. Hunt and Mr. Rau of the Electric Power Board of Review. Mr. Rau was a rate expert and a member of the Board. I went to Washington to confer with Mr. Hunt and Mr. Rau as I saw in a press release that the Electric Power Board of Review had been formed with Mr. Hunt and Mr. Rau as members. I saw Col. Hunt or Mr. Rau at Washington on numerous occasions over a period of about a year. These meetings related exclusively to applications by municipalities for Federal loans and grants where our property was involved.

Q. Did Colonel Hunt or Mr. Rau at these conferences tell you what were the matters which would be considered by the Public Works Administration in determining whether an application for a loan and grant for an electric utility would be approved?

Mr. SCOTT: We object, because you are going into the question of authority for these people and no foundation made there and nothing binding upon this evidence.

The Court overruled the objection and admitted the evidence, to which ruling exception was taken and allowed.

The COURT: Just take this Mr. Stenographer: The argument of counsel anticipated a far wider ruling than this court has ever made. The ruling of the court is that statements made by Mr. Ickles, himself, and the statements now offered as the subject matter of testimony, being made by the Chairman of the Electric Power Board of Review, are made by such high and responsible officials, shown under the evidence to have sufficient authority to make statements about the matters now under investigation. This ruling goes this far and no further for the time being. The Court thinks in exercising a wide discretion, having before it the facts that it has about the duties of this Electric Power Board of Re-

view, and having before it the fact that they passed on this Greenwood County project and having in mind the common sense proposition that Mr. Ickes for technical matters like that had to have some responsible officials who would deal with people that came up to see him about projects, and that of necessity a board of this kind would be created. The court thinks that having all those things in consideration and exercising discrimination there about it, this testimony will be admitted.

Mr. SCOTT: Exception.

The COURT: Exception taken and allowed.

The WITNESS: Colonel Hunt and Mr. Rau did state to me the matters which would be considered by the Public Works Administration in determining whether or not an application for loan and grant would be approved.

Q. Will you please state what these members of the Electric Power Board of Review, Colonel Hunt and Mr. Rau, told you at these conferences about the matters which would be considered in determining whether an application for a loan and grant or a duplicate public utility would be approved?

Objection was made to this question on the further ground that if the Board had any authority it did not include the right of a member of the Board to discuss such matters informally when the Board was not in session.

The COURT: Did you talk over these matters (592) seriously when they made those statements? A. (The witness) Yes, sir.

The Court held that the evidence was admissible, ceptions being taken and allowed.

Q. Will you please state the substance of what was said by Colonel Hunt and Mr. Rau?

Objection by Mr. Scott and Mr. Robinson.

The COURT: The objections of Mr. Scott and Mr. Robinson taken and allowed.

Mr. DEMPSEY: Will you please give the date of the

conference and what was said, not just an indication of what was said.

There were a great many conferences with the Board over a period of a year. I would have difficulty in recalling each particular date. The first conference was in the Department of the Interior Building in 1934, only a week or so after the Board was appointed and all three members of the Board were present. The statements made to me to which I have referred were the subject of discussion at many of the conferences. Each one of the conferences dealt with applications for loans and grants by municipalities served by our companies.

The substance of what the Board told me was that rates would be considered and be an important factor in determining whether or not the grants and loans would be approved. That the process would require that Mr. Rau, the rate expert, would determine the lowest rate under which the municipal plant could operate and make operating expenses and make interest. The utility company would be given the opportunity of making a rate at least equal to or lower than the rate of the municipal plant. If we should make a rate equal to or lower than the municipal rate, the project would lack social desirability and would not be approved. When I say "we" I mean I was told as representing the utilities.

Mr. SHER: I should like to make the statement that the government still objects to this entire line of testimony.

The COURT: That is thoroughly understood. All the testimony is taken subject to the objection by all the defendants and all this testimony is inadmissible you contend, and I am overruling that and you have objected and the exception is allowed.

Mr. SHER: It will not be necessary to object to each question?

The COURT: No.

I was told that rates generally were too high and should be reduced. We had to give assurance to the Board that our rate, equal to or lower than the rate the municipality could charge, was actually put into effect. As to the possibility of the municipality reducing its proposed rates we were told that if the municipality came

back with rates lower than our new low rates, the project would be re-opened and reconsidered and we would then be given the opportunity to lower our rates some more. They said in case we did not do that the social desirability (593) of the project would remain. About twenty-five projects distributed through about ten states in the middle west were involved in these conferences which I had with the Electric Power Board of Review. Some of the projects involved general obligation bonds. Colonel Hunt and Mr. Rau told me there would be no difference in the matters which would be considered by the Public Works Administration in passing upon an application for a loan and grant whether it was based upon general obligation bonds or revenue bonds. In either case the rates would be determined at the lowest point under which the municipal plant could operate and we would be given the opportunity of making a lower rate.

I am familiar with the signature of Col. Hunt. The letters shown me marked for identification plaintiffs' exhibits 50 to 53, inclusive, and 55 to 58, inclusive, are original letters which I received in due course of mail. They are signed by Col. Hunt, Chairman of the Electric Power Board of Review. They relate to the projects about which I was dealing with the Board. I was representing the utilities operating in the various municipalities where the applications for loans and grants, referred to in the letters, were made.

The two telegrams shown me, marked plaintiffs' exhibits 54 and 59 for identification, were received by me from Col. Hunt. They are the original telegrams delivered to me by the Telegraph Company. They also relate to applications for loans and grants by municipalities about which, I, as representative of the utility companies, was dealing with the Electric Power Board of Review.

Mr. Scott: If your Honor please, let these records show the defendants, at least the government's defendant, Mr. Ickes, separately objects to each of the exhibits or instruments offered for the reasons we have previously stated.

The Court: All right.

Mr. D. W. Robinson, Jr: We understand our objection is in.

The Court: I think they are admissible, gentlemen.

I haven't read each in detail, but I have glanced at them. They all deal with the projects. They are admissible if for no other reason than in reply—I have been reading Mr. Ickes' testimony and all of them are signed "Henry T. Hunt, Chairman for the Administrator", and I know and you know and everybody else knows that Mr. Ickes couldn't focus his attention on the details of every one of these projects for which application was made, and if the government found it necessary to have an advisory board to act for him, that is mighty strong evidence that the assistance was so necessary that in order to get at the truth of the matter, we have got to have their transactions under investigation here in this court.

Mr. SCOTT: Let us have a separate exception and objection to each.

The COURT: *Eceptions* taken and allowed by each defendant to the introduction of each and every one of these exhibits.

The letters and telegrams identified by the witness were admitted in evidence as plaintiffs' exhibits 50 to 59, inclusive:

(594) Plaintiffs' Exhibit 50 is as follows:

"FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
August 21, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Company,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

With regard to Docket 3571, application of the Light and Power Improvement District No. 1, Rector, Arkansas:

This project is before the Electric Power Board of Review and presents a situation substantially similar to that in Trenton and Kennett, Missouri.

If the Arkansas-Missouri Power Company is willing to provide a rate more advantageous to the District than cost of current to be furnished by the proposed plant the latter would be without social desirability. Examination here of the project shows that assuming the municipal plant will secure 64% of the competitive load, all of the City's business, and serve four adjacent cotton gins, a total of approximately 232,000 k. w. h at an average rate of 5.3¢, the project would be self-liquidating. Information is desired as to whether your Company is willing to put in effect the rate necessary to meet the proposed competition.

It appears that about April 25 the Commissioners of the Light and Power Improvement District, Messrs. Sneed, Abney and Bearden, conferred with James Hill, Jr., President of the Arkansas-Missouri Power Company and H. O. Ponder, the Attorney of the Company, on the subject of the purchase of the Company's distribution system by the District. The Company's representative stated that it would be impossible to sell the distribution system as it was incumbered by bonds covering that and other property.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator."

Plaintiffs' Exhibit No. 51 is as follows:

"FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
October 30, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Company,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

In reply to your letter of October 26 relative to the (595) Dowagiac, Michigan, electric project, Docket No. 5995:

Mr. Rau determined that the rates which you proposed to offer Dowagiac, set forth in your supplementary protest, are as low as those which the proposed municipal plant could effect. By letter dated October 22 I so advised Mayor Howell and suggested that the City withdraw its application as soon as it was clear that the rates would be made available. In reply to a subsequent communication I advised him also that if it appeared that the Michigan Gas and Electric Company was unwilling or unable to put the proposed rates into effect we would of course consider the Project without regard to the Company's offer. I believe that the proper course for the Company is to take prompt steps to put the proposed rates into effect.

Very truly yours,
HENRY T. HUNT,
Chairman,
For the Administrator.

Plaintiffs' Exhibit No. 52 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
August 22, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

This Board has before it the application of the City of Washington, Kansas (Docket 5264) for a loan and grant in the amount of $92,866 to finance the construction of a Diesel engine generating plant, 375 k. w. capacity, and a distribution system for 573 consumers, including street lighting system for 55 street lights.

It appears that the City of Washington is now served by the Kansas Power Company, one of the sub-

sidiaries of the Middle West. The applicant proposes a reduction of 15% from the rates filed by the Kansas Power Company as of March 10, 1930. It is understood that your Company has either placed in effect or proposes a reduction in the said rates. In order that this Board may determine whether or not the project is socially desirable, you are requested to inform us what revision in rates you propose for Washington and when such rates will be put in effect.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator.

Plaintiffs' Exhibit No. 53 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

(596) ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
August 27, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Co.,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

With regard to Kennett, Missouri, Docket No. 2427, and projects of other Missouri cities served by the Arkansas-Missouri Power Company, one of your subsidiaries:

I think you should furnish this Board with a certified copy of the order of the Missouri Public Service Commission approving the rate reduction effective September 1 in order that this Board may have formal evidence of that approval. As I understand the situation, the order applies to several of the other cities served by the Com-

pany as well as to Kennett. If there are separate orders I should like to have copies of each order.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administration.

Plaintiffs' Exhibit No. 54 is as follows:

POSTAL TELEGRAPH

456 31 GOVT 6 EXTRA

G WASHINGTON DC 4 621P

EDWIN VENNARD
CARE MIDDLE WEST UTILITIES CO TWENTY NORTH WACKER DRIVE CHGO RE DOCKET EIGHTY SEVEN THIRTY FIVE SEND NINETEEN THIRTY THREE CLASSIFIED SALES REVENUES CUSTOMERS ALSO PRESENT RATES CENTRAL ILLINOIS PUBLIC SERVICE COMPANY IN PETERSBURG ILLINOIS.

H. T. HUNT,
Chairman Electric Power Board Review
for the Administrator.

Plaintiffs' Exhibit No. 55 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
November 26, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Company,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

In your letter of October 6 regarding the Concordia,

Missouri, electric project, Docket No. 2718, you state that the Missouri Public Service Company "has offered the City further reductions in street lighting service amounting to 22% and reduction in rate for municipal water pumping of approximately 47%". I assume that (597) the offer or offers referred to were recently made. Would you be good enough to advise me fully regarding such offers, especially as to the dates on which they were made, the city officials to whom they were addressed, and the exact rates offered.

Very truly yours,

(Signed) HENRY T. HUNT,
HENRY T. HUNT,
Chairman,
For the Administrator.

Plaintiffs' Exhibit No. 56 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
August 27, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Co.,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

With reference to Stigler, Oklahoma, Docket 7472:

This project is one for the financing of a municipal electric system, including a generating plant.

In determining upon its recommendation this Board would be aided by a statement from the Middle West Utilities Company stating what revisions in rates are contemplated in Stigler and what date such revised rates will become effective.

Very truly yours,
(signed) HENRY T. HUNT,
HENRY T. HUNT,
Chairman for the Administrator.

Plaintiffs' Exhibit No. 57 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
October 12, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Company,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

In reply to your letter of October 6 regarding the Middlesboro, Kentucky, electric project, Docket No. 309:

Mr. Rau has examined the supplementary information submitted by you showing the various rate (598) changes made in Middlesboro and has concluded that the existing rates are not sufficiently low to require reconsideration of the project.

Very truly yours,

(Signed) HENRY T. HUNT,
HENRY T. HUNT,
Chairman,
For the Administrator.

Plaintiffs' Exhibit No. 58 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
November 14, 1934.

Mr. Edwin Vennard,
C/o Middle West Utilities Company,
20 North Wacker Drive,
Chicago, Illinois.

Dear Mr. Vennard:

In reply to your letter of November 7 relative to the San Angelo, Texas, electric project, Docket No. 6756:

So long as your proposed new rates are know only to you and to the Mayor of San Angelo, it will be impossible to consider them in our study of the project. I suggest that you send me a copy of the proposed new rate schedule and that you send a copy also to Mr. E. E. Lowrie, City Manager of San Angelo, who has been in communication with this Board regarding the application.

Very truly yours,

(Signed) HENRY T. HUNT,
HENRY T. HUNT,
Chairman,
For the Administrator.

Plaintiffs' Exhibit No. 59 is as follows:

POSTAL TELEGRAPH

The International System

Received at	Commercial	All America
Hearst Bldg.	Cables	Cables
Room 721		
State 6734	Mackay Radio	

AB 190 23 4 EXTRA GOVT UX-G
WASHINGTON DC 408 P

Nov. 30 1934

EDWIN VENNARD. CARE MIDDLE WEST UTILITIES 20 NORTH WACKER DR.

HAS YOUR SUBSIDIARY PLACED IN EFFECT REDUCED RATES IN SAN ANGELO TEXAS CITY MANAGER SAYS NO REDUCTION HAS BEEN MADE.

H. T. HUNT,
Chairman Electric Power Board of Review for the Administrator. 329P.

CROSS EXAMINATION.

(599) By Mr. SCOTT on behalf of Harold L. Ickes:

Mr. SCOTT: Before proceeding to cross examine this witness we would like the record to show we do so without waiving any of our rights on the objections made heretofore on his direct examination.

The COURT: Oh, certainly.

I came to Washington as representative of certain utilities to discuss the question of rates with the Power Board. I don't know who made the first suggestion that I go for conferences with the Board. I went of my own accord. I was representing the companies that would be damaged by these loans and grants. I went because I was handling these matters for those companies. I was naturally opposed to the loans and grants because they would result in the destruction of property I represented. I went to Washington to determine if there was some way we could avoid having the loans and grants approved; to determine if by lowering rates we could cause the projects to be not approved.

At the first meeting we had quite a general discussion of policy and rates. As to who first said the word "rate", I am not able to say, but the substance of that conference was that if we could reduce our rates, we would be given an opportunity to reduce them below the municipal rate which would destroy the desirability of the project. I went to Washington to see if rate reduction would forestall the approval of the projects.

I have said at the first conference there was a general discussion.

Q. Mr. Hunt didn't make such a suggestion, did he? A. Later on yes and possibly the first meeting, yes. As to who said it first I can't say.

I point out that we had in mind rate reductions here and there during the year. When the subject of rates was brought up I was told we would be given the opportunity to reduce our rates below the municipal rates. I went down there first to see what the municipal

rates were, to determine if we could possibly meet those rates. Mr. Hunt didn't mention rates as much as Rau. I cannot say whether any particular schedule of rates for us to adopt was suggested at the first meeting but there was at the second. I can name a number of communities for which Mr. Rau suggested rate schedules. In Dowagiac, Mich., for example, he determined the lowest rate under which the municipal plant could operate and I was told if we made a rate equal to that or less, there (600) would be no social desirability of the municipal project and it would not be approved. We made such a rate and the project was not approved.

The question of a project being self-liquidating and the question of social desirability were separate and distinct questions. The question of social desirability was whether or not the rate of the municipal plant was lower than ours or ours lower than theirs. That was the test—the cheapest rate to the customer. That was not my idea. Social desirability was their term.

If we made a rate lower than the rate under which the plant could be operated, that destroyed the social desirability. Likewise if the municipal plant proposed a rate higher than ours it would not be considered because there was no social desirability to be gained.

In the case of Dowagiac the city proposed a rate lower than our present rate and Mr. Rau determined that the city could operate under that municipal rate, and we were given an opportunity to make a rate equal to or lower than that, and we did so, and the project was not approved. There is now outstanding an allotment for that project; and it is restrained in the courts at the instance of one of the companies I represented. The project was not approved by the Electric Power Board of Review when we put in our rates which were lower than the rates Mr. Rau determined that this plant could operate under. The City was notified by Mr. Hunt that our rates were reasonable.

Mr. Hunt also asked us to give evidence that the rate was formally put into effect. We gave that evidence by a copy of a letter we wrote the City of Dowagiac, formally putting these lower rates into effect.

The Electric Power Board of Review did not approve that project. Somebody later on approved it. The Board had authority to disapprove it, and it did in the case of Dowagiac. They wrote the City of

Dowagiac to withdraw their application owing to our (601) lower rates. I have read that an allotment for Dowagiac was approved later.

CROSS EXAMINATION.

Mr. D. W. ROBINSON, JR.: May I on behalf of Greenwood County ask the witness a few questions reserving my rights?

The COURT: Yes, sir.

The term "social desirability" was used in our conversations as referring to cheap electricity. Yes, it referred to cheap electricity in the area which the application covered, but they spoke of social desirability also in the broad sense of lower electric rates everywhere in order that people could use more electricity and get the benefit of electricity. The use of the terms in our conversations was with regard to applications in different localities. In every case it came down to a comparison of the rates in the particular community.

On my first visit to Washington I talked to all three members of the Board together, but on my subsequent visits I didn't ever talk with all three of them together. I didn't talk to Mr. Cooke again on these matters. Sometimes my conversation would be with Col. Hunt; sometimes with Mr. Rau, and sometimes with both together.

The witness having been recalled testified as follows:

DIRECT EXAMINATION.

In the case of the City of Dowagiac, after we reduced our rate down to the city's rate and the project was disapproved, Mr. Hunt notified me that the city had again made a lower rate than our new low rate. The city actually made that rate in a new application. Then the project was approved. We were asked if we cared to reduce or could reduce our rate down to the new low rate of the city. We informed Mr. Hunt that we could not reduce our rate any further.

(602) MR. D. E. BYERLEY, a witness for the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I reside in Adrian, Mich. I am President and General Manager of the Citizens Light & Power Company and have been for thirteen years. The Town of Tecumseh, Mich., is served by our company. It made an application to the Public Works Administration for a loan and grant for the purpose of constructing a municipal electric utility. I represented our Company in connection with the application. In that connection I wrote to the Public Works Administration and received a reply. The letter you show me, marked Plaintiffs' Exhibit 60 for identification, is the original letter I refer to and was received in the due course of the mail.

The letter was offered in evidence by plaintiffs.

Counsel for all of the defendants objected to the admission of the letter, on the ground that it related to a contract and to transactions not involved in this case. (Similar objections were made by counsel for defendants to the testimony of the witnesses, Post and Vennard, and to the letters and telegrams introduced as a part of the testimony of these witnesses. Each of the objections were overruled by the Court, and to each ruling defendants took an exception which was allowed by the Court.)

The COURT: The objection is on the same ground that has been previously argued. Court overrules objection. Exception taken and allowed. The Court thinks the evidence is admissible for three reasons, to sum them all up. In the first place, they are a reply to the testimony of Mr. Ickes which is already in the case? In the second place, they are admissible on the ground that they show the interpretation of similar contracts by the parties charged, as far as the PWA is concerned, with entering (603) into and controlling those contracts, and they tend to help this Court determine what would be in the opinion of the people entering into the contract, the natural, normal result of this particular contract here.

There is the objection which is not only technical but has some merit in it, as to whether or not the Electric

Power Board of Review has authority to speak, so that its statement would be in reply to Mr. Ickes' individual testimony. Well, that is a point not without some difficulty, but every one of these letters is signed "Chairman for the Administrator", so he assumed to act, and the fact that a Board like that acted for a man, under his control, over a long period of time certainly suggests that the only reasonable conclusion in the world is Mr. Ickes knew the Board was so acting and therefore we have the element of ratification of agency. Furthermore than that, I think under the common sense view of them they had power to speak for themselves, because they were instructed in these matters. I think the testimony is admissible.

Mr. DEMPSEY, Counsel for Defendants: May we have noted our exception to that ruling of Your Honor? We move to strike out the testimony. The contracts in each of these cases may or may not be material, but certainly negotiations leading up to those contracts can't be material on any basis as showing what rights the public would acquire under the contract.

The COURT: Oh, the details of the contracts are necessarily different, but all of them are contracts where the government was going to lend money to build a municipal plant that would operate in competition with a privately owned plant, and that is the kind of situation involved in this case, and therefore so far as the main elements are concerned they are similar.

(604) Mr. DEMPSEY: If Your Honor please, the contracts, not the negotiations leading up to them, show what the rights are under them.

The COURT: Of course, but we are not trying a case on those contracts, but I am admitting statements against interest which were had in those negotiations leading up to the contract. I think they are admissible.

The letter was admitted in evidence as Plaintiffs' Exhibit 60, and is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW

Washington, D. C.,
August 22, 1934.

Mr. D. E. Byerley,
Vice-President and General Manager,
Lenawee County Light & Power Co.,
Adrain, Michigan.

Dear Sir:

Your letter of August 13 to Colonel Waite with reference to the Tecumseh, Michigan, electric power project, Docket 7307, has been referred to me for reply.

This project is now before this Board for recommendation.

I note the opinion of counsel to the effect that your Company has a perpetual franchise in Tecemseh. There is, however, no claim that it has an exclusive franchise.

The process in PWA is to examine into the question of engineering soundness, reasonable security and social desirability. The last factor depends upon whether or not the municipal project will provide current at rates substantially less than those at which it is provided by the existing utility. Hence this Board in all such cases is aided by information as to existing rates and what pros- (605) pect there is of rate reduction. In fact it has been its policy to afford the existing utility an opportunity to offer to place in effect such a rate reduction as will meet the proposed rates of the municipality. If you wish to make any statement on this subject the Board would be glad to receive and consider it. The matter of a hearing can wait until we receive the information suggested.

Very truly yours,

HENRY T. HUNT, (Signed)
HENRY T. HUNT,
Chairman,
For the Administrator.

After I received that letter from Colonel Hunt, dated August 22, 1934, I went to Washington for the purpose of

discussing with Col. Hunt on the basis of that letter, the application of Morenci, Mich., for a loan and grant for an electric utility. My Company also served the Town of Morenci. In line with what Col. Hunt said in his letter about rates I took information with me to show that in the case of Morenci our rates were the same or lower than the ones proposed in the engineers' estimate on which the application was made to the PWA Board. I showed that the average revenue which we got per kilowatt hour was the same as the average revenue which they estimated for the first year, and that it was within 1/100¢ of what they estimated for the fifteen years, in the hope of convincing Mr. Hunt that the Morenci project should not be allowed. Mr. Hunt told me they figured the village of Morenci could sell current 15% less than the rates this engineer had set up in his estimate filed with the application.

I asked Mr. Hunt if that meant we would have to reduce our rates 15% and he said yes. I asked him if we (606) did not do it what would happen and he said the project would be approved.

The COURT: Let me understand one thing from counsel for plaintiffs. Of course counsel for Mr. Ickes probably has knowledge of all of these matters, but Greenwood County is in a little different situation. While the County is associated in this suit with the Administrator it had no way of knowing in advance of this trial what witnesses the plaintiffs were going to bring here.

Mr. ROBINSON, Counsel for Plaintiffs: Counsel for Greenwood County were given a copy of this particular letter, and certainly a copy of some of Mr. Vennard's letters.

The COURT: The point I am getting at is, if you have any further witnesses along this line, I think in fairness to Greenwood County and to the Court you might let us know.

Mr. ROBINSON: I should be very glad to do so. The only other witness we have along this line is Colonel Carter, who represents the Texas Utility Company, and the gentlemen on the other side were asked to produce the correspondence with him. In addition we have requested them to produce copies of letters which were written to a utility company in Florida, and also other papers which we propose to introduce.

Mr. DEMPSEY, Counsel for Defendants: We never heard of Morenci, Mich., until today, and we may find it necessary to communicate and find out what the facts were on this particular project, in order that Your Honor may have the facts. And may we have the same right with Mr. Byerley to cross examine him later this afternoon and not at this time, in order to find out more about these two projects?

The COURT: Certainly.

Defendants later announced that they had no cross examination for the witness Byerley.

(607) GEORGE H. CARTER, a witness for the plaintiffs, having been duly sworn, testified as follows:

I reside at Marlin, Texas, and am an attorney at law. I am attorney for the Central Division of the Texas Utilities Company and a Director in the Company and the Vice-President. The Towns of Marlin and Plainview, Texas, are served by the Texas Utilities Company. They made application to PWA for loans and grants for the construction of municipal electric utilities. I had charge of the protest against the Marlin application but did not have anything to do with the protest with reference to the Plainview application originally, although subsequently I did come to represent the company, with attorneys for the Plains Division in which Plainview is located, in connection with those matters. Plainview is 450 miles west of Marlin where I reside.

I received a telegram dated August 18, 1934, in the regular course of business from Colonel Hunt, Chairman of the Electric Power Board of Review.

The telegram referred to was marked Plaintiffs' Exhibit 61 for identification, and was offered in evidence by plaintiffs.

Mr. DEMPSEY, Counsel for Defendants: Enter our same objection if Your Honor please.

The COURT: I have just read Judge Parker's opinion. I don't see how the plaintiffs could try this case without testimony along this line. The objection is overruled and the defendants allowed an exception.

The telegram, Plaintiffs' Exhibit 61, was admitted in evidence and reads as follows:

POSTAL TELEGRAPH

D69 48 GOVT 4 EXTRA—G

WASHINGTON DC 18 136P

BARTLETT CARTER AND RICE ATTORNEYS
MARLIN TEX 1934 Aug 18 PM 2 04

(608) REFERENCE PROJECT MARLIN ELECTRIC SYSTEM SUGGEST YOU INFORM CLIENT THIS BOARD WISHES ASCERTAIN WHETHER COMPANY WILL PLACE IN EFFECT RATES LESS THAN THOSE OFFERED BY MUNICIPALITY STOP POSSIBLY ITS REPRESENTATIVE WILL CALL ON ME HERE PROMPTLY IN ORDER THAT THIS MATTER MAY BE DETERMINED.

H. T. HUNT,
Chairman Electric Power Board of Review
For the Administrator.

Before receiving that telegram I had had no communication with Colonel Hunt. I had not written him or telegraphed him.

In response to that telegram I went at once to Washington. I made an appointment on August 22 with the Electric Power Board of Review.

I first called on Mr. Hunt and discussed the matter with him. He referred me to Mr. Otto Rau, whom he told me was a member of the Board and the rate expert for the Board. I then went to talk with Mr. Rau. I attempted to go into the economic features with Mr. Rau and explained to him that we had a number of small towns and communities and served a number of farmers, with the total population of approximately thirty thousand people spread over an area 105 miles long, with small gross. If the gross from one of our towns was lost it would hamper us materially in serving all of these small communities and farmers at the same rate as we did. Mr. Rau told me that the regulations were so framed that they must consider alone, the application of the town presenting the application, and not consider the advantages or disadvantages economically of other towns connected with the system. He told me the only matter with

which they were concerned was the matter of rates and that unless we would reduce our rates to those offered by the city the application would be granted. He stated that (609) in its application the city had offered to serve the people at 15% lower than the rates then in effect by the company.

I explained to him that I had no authority to make rates, that I would immediately communicate with my clients and the executives of the company who did have authority, and would report to him just as soon as I could.

The telegram shown me, marked Plaintiffs' Exhibit 62 for identification, was received by me in the regular course of business.

Mr. DEMPSEY: We offer the same objection to this telegram.

The telegram was admitted in evidence as Plaintiffs' Exhibit 62, and reads as follows:

WESTERN UNION

6D D 11 GOVT NM 1 EXTRA

WUX FORT SAM HOUSTON TEX AUG 28 1934

GEORGE H. CARTER
ATTORNEY AT LAW MARLIN TEX

RE MARLIN PROJECT CANNOT CONSIDER REVISED RATES UNLESS SUBMITTED PROMPTLY

HENRY T. HUNT
WASHINGTON
820A 29

I sent Col. Hunt the telegram dated March 29, 1934, marked Plaintiffs' Exhibit 63, for identification.

This telegram was admitted in evidence as Plaintiffs' Exhibit 63, and reads as follows:

WESTERN UNION

Marlin, Texas, August 29, 1934.

(610) Mr. Henry T. Hunt, Chairman,
Electric Power Board of Review,
Room 5139, Interior Building,
Washington, D. C.

REWIRE ACTIVELY WORKING WILL ADVISE IN NEXT FEW DAYS.

GEO. H. CARTER.

I received from Col. Hunt the telegram, dated October 2, 1934, marked Plaintiffs' Exhibit 64, for identification.

This telegram was admitted in evidence as Plaintiffs' Exhibit 64, and reads as follows:

POSTAL TELEGRAPH

D131 32 GOVT 7 EXTRA XU—G
WASHINGTON DC 2 623P

1934 OCT 2 PM 6 14

GEORGE H. CARTER
MARLIN TEXAS

WHEN WILL WE RECEIVE RATE SCHEDULES FOR MARLIN STOP NECESSARY SAME BE SUBMITTED PROMPTLY OTHERWISE MUST PROCEED WITH ACTION ON DOCKET SIXTY EIGHT EIGHTY FIVE.

H. T. HUNT,
Chairman Electric Power Board of Review
For the Administrator.

I sent Col. Hunt the telegram dated October 6, 1934, marked Plaintiffs' Exhibit 65, for identification.

This telegram was introduced in evidence as Plaintiffs' Exhibit 65, and reads as follows:

WESTERN UNION

Marlin, Texas, October 6, 1934.

Col. H. T. Hunt, Chairman,
Electric Power Board of Review,
Interior Building,
Washington, D. C.

ON RETURNING TO MY OFFICE FOUR O'CLOCK SATURDAY AFTERNOON OCTOBER SIXTH AFTER A WEEK'S ABSENCE I FOUND (611) YOUR TELEGRAM OF OCTOBER SECOND PERIOD THROUGH SOME OVERSIGHT IT WAS NOT RELAYED TO ME PERIOD I WILL GIVE YOU THE INFORMATION REQUESTED ON TUESDAY OCTOBER NINTH.

GEO. H. CARTER.

I also sent Col. Hunt the telegram, dated October 9, 1934, marked Plaintiffs' Exhibit 66, for identification.

This telegram was admitted in evidence as Plaintiffs' Exhibit 66, and reads as follows:

WESTERN UNION

Marlin, Texas, October 9, 1934.

Col. Henry T. Hunt, Chairman,
Electric Power Board of Review,
Interior Building,
Washington, D. C.

TEXAS UTILITIES COMPANY WILL SHORTLY ANNOUNCE ONE CENT REDUCTION IN FIRST STEP OF DOMESTIC RATES INCLUDING ALL SMALL TOWNS AND RURAL CUSTOMERS AS WELL AS MARLIN.

GEO. H. CARTER.

Plaintiffs' Exhibits 62 and 64 are telegrams received by me from Col. Hunt in the regular course of business.

Plaintiffs' Exhibits 63, 65 and 66 are copies of telegrams which I sent Col. Hunt. They are copies retained in my files of the original telegrams delivered to the Telegraph Company.

Plaintiffs' Exhibits 63, 65 and 66, being telegrams from Col. Carter to Col. Hunt, were introduced as connecting links in the correspondence, but not for any probative value as to any of the facts therein stated.

After this exchange of telegrams I went to Washington to confer with representatives of the Public Works Administration in January, 1935. I saw Major Fleming in the Interior Building and asked him to give us a hearing on both the Plainview and Marlin protests. He (612) arranged a hearing before the Electric Power Board of Review on March 1, 1935. The hearing was held on that date and I was present. There were several other gentlemen representing the Texas Utilities Company present. Mr. Otto Rau of the Electric Power Board of Review was present and held the hearing himself.

We took up the Marlin application first. Mr. Veach, representing the Company, went through the survey that he had made with reference to Marlin. I then went through the supplemental protest that I had filed with reference to Marlin. I noticed that Mr. Rau made no comments, and I finally asked him if he was interested in the part of the protest I was presenting. He stated that he was interested, but that it was not a matter of concern, that the only matter he was interested in was the matter of rates; whether we would lower our rates. After noon we went into the Plainview matter. We had Mr. Veach go rather hurriedly through his report with reference to Plainview. Mr. Crenshaw then made a brief resume of the protest that he had filed for Plainview, and then we got as rapidly as we could to a rate that had been worked out and had just been submitted to the City Council at Plainview. Mr. Rau's attitude at once changed, as soon as we went into the matter of rates. He at once became interested. Mr. Allen, the General Superintendent for the Plains Division, presented the rate. Mr. Rau followed it very closely and stated, "That is the kind of rate that we are looking for". He said, "We want to be assured that that rate is in force". We assured him that it would be placed in force at once in Plainview and Marlin and he asked us then some questions about the rate, what provisions we had made in

this rate for taking care of our revenue, because he said, "There will be a slump, necessarily, in your revenue, between the time of the installation of that rate and the time your customers increase their consumption of (613) electricity under it". Mr. Allen then explained the method that we had adopted in connection with it, of "freezing" the revenues, so as to bridge over the gap. Mr. Rau stated that we were entitled to do that, because it was necessary for us to collect revenues to take care of the overhead or running expenses. The hearing closed with the understanding that we would at once file letters with the Electric Power Board of review, installing those rates in Marlin and Plainview. Mr. Rau stated to us that he would write a letter to the Mayor of Marlin and to the Mayor of Plainview, telling them that their projects could not pay out in competition with that rate. He stated that if the applications were not withdrawn they would be disapproved. I don't know whether the Town of Plainview subsequently filed any new application or different schedule of rates. Plainview is in west Texas and I live in central Texas.

Immediately on the close of the hearing I reported the action to Major Fleming. He was Assistant Administrator under Mr. Ickes. I knew him then only as one high up in authority in the organization. I have since learned that he was Deputy Administrator. I told Mr. Fleming that we were elated to have gotten that trouble behind us so as to preserve our property. He stated that the Department was willing to cooperate with those companies that lowered their rates.

Cross Examination.

I testified as a witness in the District Court of the District of Columbia in the case of *Texas Power Company* vs. *Ickes and others*, about a year ago. In the course of my testimony I said: "We went to Mr. Rau a few days later, it may have been the Friday following March first, and we told Mr. Rau that the Texas Utilities Company would immediately install the same rate that (614) he had approved, in all of the towns served by the Plains group and the Central group of the Texas Utilities, if the Electric Power Board of Review would agree to refuse to receive any further applications from any towns served by our company in those two areas. Mr.

Rau said it would be impossible to make that agreement, because 'We are bound to accept and consider every application filed before the Board, but I am assuming that at no time none of your towns or none of the towns served by you can make a better showing than that made by Marlin and Plainview, in which case, while the applications will be considered, they will take the same course and would likewise be rejected for the same reasons that they cannot pay out'." That is a correct statement of my testimony and of the conversation that took place with Mr. Rau a few days after the first of March.

I understand that after the protest was filed with respect to Plainview and after we had those discussions with Mr. Rau, the Plainview application for a loan and grant for a municipal power project in competition with the Texas Utilities Company was allowed and that a loan and grant agreement was entered into between the City and the Government. As a result of that loan and grant a suit was brought in the District of Columbia and was tried before Judge Wheat. It is my understanding, all secondhand, that after he decided the case and while it was pending on appeal, the Texas Utilities Company had negotiations with the City in an attempt to work out the differences between them. As a result of those negotiations the Utilities Company and the City did agree upon a rate that was satisfactory to the City and the suit was dismissed. I do not think any representative of the Public Works Administration had any part in the negotiations between the Company and the City. You understand, as I said, I was 450 miles away and had no part in those negotiations. It was my general understanding that they were held between the Texas Utilities Company and the representatives of the City and that (615) the case tried before Judge Wheat was dismissed.

Before I came to Washington to talk to Mr. Hunt the first time, I wired Senator Sheppard of Texas to arrange a conference for me with the Board. I wired Senator Sheppard immediately upon receipt of Col. Hunt's first telegram on August 18th.

The COURT: Let me get that straight. Do you mean that you got the telegram before you even went to Washington.

The WITNESS: Yes, sir.

The COURT: You hadn't been up to talk to them at all?

The WITNESS: No, sir, I didn't know anything about the Electric Power Board of Review, or know that there was one for that matter. The protest was filed before the Advisory Board of Texas, located at Fort Worth.

The COURT: So the officers in Washington had some previous notice that your company was protesting?

The WITNESS: I assume so Your Honor. I went to Fort Worth to file the protest in December, 1933. I argued the protest before the Advisory Board and then went back home. I heard nothing more and didn't know what had become of it. The next thing I heard was on August 18, 1934, when I received this telegram from Col. Henry T. Hunt.

The cross examination by counsel for defendants continued: The allotment for Plainview was approved some time after the 1st of March, 1935. I had to go to Miami, Fla., to try a case and heard of it while I was down there.

RE-DIRECT EXAMINATION.

Q. Well, Col. Carter, do you know whether the City of Plainview made any further reductions in rates after March 1, 1935?

(616) COUNSEL FOR DEFENDANTS: I think the witness has already testified he doesn't know.

COUNSEL FOR PLAINTIFFS: If he has, all right, I just wanted to be sure of that. To the witness: He says you have covered it Colonel so that is all.

(617) Plaintiffs offered, and the court admitted, in evidence as Plaintiffs' Exhibits 67 to 73, inclusive, the following letters, the originals or copies of which were produced by the defendant, Harold L. Ickes, in response to an order of the court to produce the same.

To the admission of these letters in evidence the defendants objected on the ground of irrelevancy, the authenticity of the letters being admitted. The objection was overruled by the court and an exception was taken by defendants and allowed by the court.

PLAINTIFFS' EXHIBIT NO. 67 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW.

Washington, D. C.
August 27, 1934.

Mr, T. O. Kennedy,
Vice-President and General Manager,
The Ohio Public Service Company,
Hanna Building,
Cleveland, Ohio.

Dear Sir:

In reply to your letter of August 14 regarding the Sandusky, Ohio, electric power project, Docket No. 7004:

You state that the offer by the Ohio Public Service Company to the City of Sandusky of a rate contract embodying exactly the rates proposed by the City for its municipal plant, is still open. It is noted also that in May, 1933, the Company submitted for approval by the City Commission a minimum rate of 5¢ a day including 10 kwh per month, with a rate of 3¢ per kwh for the next 290 kwh per month and of 2¢ per kwh for anything in excess of 300 kwh per month.

After careful study of the project, the Electric Power Board of Review inclines to the opinion that if the offer of rates identical with the proposed municipal rates is supplemented by an optional rate based upon (618) the May, 1933, offer, said optional rate to be available to all consumers using more than 40 kwh per month, the project will be without social value and the application should be denied.

Would you be good enough to let me know whether the Company is prepared to make such an offer to the City, and to send me copies of any communications with the city relevant thereto.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Adminisfrator.

PLAINTIFFS' EXHIBIT NO. 68 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW.

Washington, D. C.
September 18, 1934.

Mr. T. O. Kennedy,
Vice-President and General Manager,
The Ohio Public Service Company,
Hanna Building,
Cleveland, Ohio.

Dear Mr. KeKnnedy:

In reply to your letter of September 4 with regard to the Sandusky, Ohio, electric power project, Docket No. 7004:

I attach a copy of letter I have written the City Manager on this subject. I should be glad to be informed of the progress of events from your standpoint.

One of the difficulties in this and like situations is to convince the municipality that the reduction of rates is not merely a temporary expedient whereby the opportunity to finance the municipal project through this Administration may be lost and with the intention on (619) the part of the competing utility to raise its rates when that opportunity no longer exists. In this connection a brief from your counsel showing what action by the Public Service Commission of Ohio is necessary to enable your Company to increase its rates would be helpful. I think that such a brief should also be submitted to the city authorities of Sandusky. My own view is that your offer is an admission that the rates proposed would earn a fair return on your propery used and useful in connection with the service to Sandusky consumers and that the acceptance of such rates will not only constitute a contract with the city but would amount to an estoppel in the absence of later changes in economic conditions which would justify the Commission in holding

that the rates prescribed by the contract would no longer be sufficiently remunerative to enable the Company to render service to Sandusky and its other consumers. It would be highly desirable from our standpoint that the city authorities be convinced that the acceptance of your offer and the withdrawal of their application here are in the interest of the city.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator.

Attached to the foregoing letter and admitted as a part of Plaintiffs' Exhibit No. 68 was the following letter:

Legal-RTH:ahe-Docket 7004
September 17, 1934.

Mr. Robert L. J. Wagar,
City Manager,
Sandusky, Ohio.

Dear Mr. Hagar:

In reply to your letter of August 30 addressed to the Administrator with regard to Docket No. 7004, electric power project for Sandusky:

(620) On July 30, 1934, the Ohio Public Service Company submitted to you and the members of the City Commission a schedule of domestic rates as follows:

10 kwh per month	$1.00
Next 40 kwh per month	.05 per kwh
Next 150 kwh per month	.03 per kwh
Excess over 200 kwh per month	.02 per kwh

The rates proposed are the same as those proposed to be charged by the municipal plant except that the 2¢ step which while only effective for full service (electric

range and hot water heating) for large dwellings is a lower rate than that effective from the proposed municipal plant.

There being no social benefit apparent which would warrant the duplication of the electric service facilities in Sandusky with rates from both systems the same, as it is doubtful that a sufficient reduction could be made in the domestic rates by the proposed municipal plant and yet provide revenues sufficient to service expenses, interest and amortization, it is the opinion of this Board that the City should accept the Company's proposal and withdraw the application for a loan and grant. I assume that such an acceptance would constitute a contract between the City and the Company under which the said rates would be the maximum to be charged for the said service unless and until the Public Service Commission of Ohio should set aside said rates as unreasonably low. Inasmuch as the Company itself proposed these rates I think it most improbable that the Commission would take such action in the absence of substantial change in economic conditions.

While the City offers general obligation bonds and such bonds are deemed reasonable security, it is nevertheless the duty of this administration to consider rela-
(621) tive social desirability. As the funds of the PWA are insufficient to meet municipal demands it is necessary that projects having higher social desirability be preferred. Where competitive conditions exist and the competitor offers rates as advantageous to the consumers as the proposed municipal rates, social desirability is lacking.

In addition to the foregoing considerations it also appears that the proposed plant is not designed to supply the entire demand. In general a loss of part of a load requires higher charges to the remainder. Hence it appears that if the municipal plant is financed such financing will have a tendency to defer reduction of rates to other consumers served by the Ohio Public Service Company. This consideration might be outweighed by benefits to the consumers served, but those benefits do not appear here.

For the reasons stated it is recommended that the City of Sandusky accept the proposal of the Ohio Public Service Company referred to and notify the Public

Works Administration that it wishes to withdraw its application for a loan and grant.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator.

PLAINTIFFS' EXHIBIT NO. 69 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW.

Washington, D. C.
December 5, 1934.

Mr. Robert L. J. Wagar,
City Manager,
Sandusky, Ohio.

Dear Mr. Wagar:

The Electric Power Board of Review has examined the supplement dated October 29, 1934, to the applica-
(622) tion of Sandusky for a loan and grant to finance construction of a municipal electric system, Docket No. 7004, and is inclined to give favorable consideration to the application on the basis of a generating plant and distribution system to cover the entire city and to serve all the existing consumers with the exception of the larger industrial and commercial consumers. It is believed that the disparity between the rates offered by the existing utility and the rates now proposed by the applicant will make the project socially desirable.

The cost of material and labor has increased since the original application was filed. Before proceeding with its recommendation this Board would like to have a detailed estimate of construction costs based on present prices and wages for the project as above described. The amount of the loan requested should be changed in accordance with the change in estimated construction costs. It is believed that the total cost will not exceed $1,550,000.

A supplement to the application containing the changes suggested, should be received by this Board not later than January 15, 1935.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator.

PLAINTIFFS' EXHIBIT NO. 70 is as follows:

August 2, 1934.

Mr. C. H. Courser, Vice-Pres. & Gen. Mgr.
Florida Public Service Company,
Orlando, Fla.

Dear Sir:

With reference to the application of Mount Dora, Docket #4446, for a loan and grant from this Administration to finance the cost and construction of a Diesel Engine generating plant of 366 Kw. capacity to supply current to the distribution system owned by the munici-
(623) pality; it appears that under date of December 16, 1933, your Company submitted a new contract at a certain rate effective after the expiration of the present contract in March 1935.

Upon analysis of the proposed rate and comparison of the cost of current as between the proposed municipal generating plant and that proposed to be furnished by your Company, it appears that there is no social advantage to the city in generating its own current, provided your company submits an optional rate, based on a demand charge so that any improvement in the load factor due to increased use of the service by the consumer will be reflected in the average cost per KWH purchased.

Please inform me promptly whether or not your Company will submit such optional rate.

Yours very truly,

(SGD) HENRY T. HUNT,
Chairman.

PLAINTIFFS' EXHIBIT NO. 71 is as follows:

Orlando, Florida,
August 16, 1934.

Mr. Henry T. Hunt, Chairman,
Electric Power Board of Review,
Washington, D. C.

IN RE: Docket #4446—Mount Dora, Florida.

Dear Sir:

We are in receipt today of a letter from Mr. Jas. E. Cotton, State Engineer, Federal Emergency Administration of Public Works, Tallahassee, dated August 14th, in reference to the above docket, addressed to Mr. C. H. Courser, Vice-President and General Manager, asking us what reply we had made to your letter of August 2nd, addressed to Mr. Courser.

(624) Permit me to advise that Mr. Courser left the employ of the Florida Public Service Company on June 1st and we had no record here of having received this letter. Evidently it had been forwarded to Mr. Courser, who is now somewhere in New England.

We immediately called Mr. Cotton, who kindly quoted your letter of August 2nd over the phone, and we have since submitted to the officials of Mount Dora a new rate, which is somewhat lower than the rate of which you have a copy, we thought it desirable to discuss with Mr. Cotton in person the new rate that we believe will meet with his approval, and have arranged a conference for tomorrow, the 17th, in Tallahassee. Mr. Cotton no doubt will advise you immediately the result of this conference, together with the rate that has been offered, or will be revised to meet the requirements as suggested in your letter of the 2nd.

Very truly yours,

MILES CARY,
Vice-President & General Manager.

PLAINTIFFS' EXHIBIT NO. 72 is as follows:

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

ELECTRIC POWER BOARD OF REVIEW.

Washington, D. C.
August 20, 1934.

Mr. Miles Cary,
Vice-President and General Manager,
Florida Public Service Company,
Orlando, Florida.

Dear Sir:

This is to acknowledge your letter of August 16 regarding the suggestion made by the Electric Power Board of Review that your Company submit to the Town of Mount Dora an optional rate based on a demand charge. I await with interest the result of your conference of August 17th with Mr. Cotton.

Very truly yours,

(625) (Signed) HENRY T. HUNT,
Chairman,
For the Administrator.

PLAINTIFFS' EXHIBIT NO. 73 is as follows:

Orlando, Florida,
August 31, 1934.

Mr. Henry T. Hunt, Chairman,
Electric Power Board of Review,
Washington, D. C.

In re: Docket #4446—Mt. Dora, Florida.

Dear Sir:

Complying with the suggestion of Mr. Rau and yourself, we have revised the rate schedule offered the Town of Mt. Dora, as of August 27th. We are attaching

herewith a copy of the new proposal for your information.

We feel that we have submitted them a very attractive rate and one much lower than they could possibly generate a like amount under like conditions for the service that they will require. This, together with the assistance that we propose to render the Town of Mt. Dora, in helping them to build up their load, which should materially increase consumption. The electric contractors and dealers in the Town will be included in our advertising scheme, the same as the dealers and contractors in towns in which we own the distribution system. In addition our salesmen will make direct solicitation for increased use of electric service, if the Town so desires. The appliances will, of course, be purchased through stores, dealers and contractors in their town.

We are making headway on our rate study and will be pleased to advise you in detail as soon as it is completed.

Yours very truly,

MILES CARY,
Vice-President & General Manager.

(626) MC:LM

cc-Mr. Jas. E. Cotton, State Engineer,
Public Works Administration,
Tallahassee, Fla.

COUNSEL FOR DEFENDANTS: I do not believe that a letter from Mr. James E. Cotton to Mr. Courser, who seems to be a power main in Florida, is competent even if Mr. Cotton sent a copy to Mr. Hunt. I suggest also Your Honor has not covered in your previous rulings letters that Mr. Cary wrote to Colonel Hunt. It seems to me that they are subject to an additional objection. Perhaps Mr. Hunt's statements are all right, but statements by a power official to Mr. Hunt, it seems to me, are not.

THE COURT: That is true.

That may be admissble to show what Colonel Hunt replied to but they are not admissible as statements of independent evidentiary matters.

COUNSEL FOR PLAINTIFFS: We offer the letters written to Colonel Hunt (Plaintiffs' Exhibits 71, 73) for the purpose stated by the Court, that is, to show the course of the correspondence and not to prove the contents of those letters.

The Court admitted the Exhibits 71 and 73 for this purpose, stating that they enable the Court to understand Colonel Hunt's replies.

(627) DAVID NABOW, a witness for the plaintiffs, having been duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a Civil Engineer by profession and a graduate of Columbia University with the degree of Civil Engineer. I graduated in 1916. I have had employment with Duke Power Company as an engineer since that time. I am now designing engineer in charge of the design of water power and steam power plants. In that capacity I am in charge of the installation of the additional unit in the River Bend plant, located near Mt. Holly, N. C. The plant was started in 1928 and was designed for the eventual installation of eight units. Two of these units were completed in January, 1930 and the third is now being installed. There is room for five more units after this new one is nstalled. The River Bend plant is a steam plant.

The Duke Power Company is essentially a hydro-Electric Generating System, with steam installation, serving as auxiliary plants to insure the supply of energy during periods of low stream flow. The present capacity of the Duke Power Company is sufficient to take care of the existing power demands in its territory and all reasonable demands in the immediate future. We are installing the third unit at River Bend to insure that those demands will be met even if we have extremely dry periods during the immediate future.

This additional unit at River Bend is not needed for the present demands on the system or any that may be anticipated for the next several years. It is needed for anticipated demands only because we want to play safe and have additional capacity.

During the period of my connection with the Duke Power Company which has been since 1916, it has been

its practice to look ahead several years and to build plants as they were necessary to take care of any reasonable demands that we could see ahead for several (628) years. The installation of the River Bend plant is in accord with that same practice.

In addition to the provision for five additional units at River Bend the Duke Power Company has invested about $5,000,000.00 in sites for possible power developments to be developed in the future as the need for same will be shown. As designing engineer it is a part of my duty to design and lay out plans for these developments. We have made a number of studies and are constantly making studies bringing them up to date, so that we are ready to go ahead with the developments at any time. Should occasion arise to go ahead we could start actual construction within thirty days.

CROSS EXAMINATION.

The table you submitted yesterday showing the amount of power generated by the Duke Power Company for each of the years since 1929 is substantially correct. Our largest year with regard to output was 1936 when our output was 2,177,000,000 kilowatt hours. That was almost 200,000,000 over 1929, our previous best year. Going back a number of years the big increase in our business was immediately after the war. It was due mostly to the movement of the cotton mills to the South and to the wearing out of the steam plants that the old cotton mills had and to their purchasing energy from Duke Power Company.

I can't tell you to what extent the increased use of electricity in the private home has affected the increase in our sales. I do not make the studies of the use of electricity. We hope there will be an increase in demand, but we can't tell to what extent such increase will take place. I can't tell you of my own knowledge to what the increase in the past year is due. I believe it is due to additional consumption on the part of the textiles as well as increased use by other customers. Yes, I pre- (629) sume it is due to economic recovery but as I said before I have no definite knowledge as to that.

The third steam unit at River Bend was started in December, 1936. It was authorized in October, 1936, and will be completed in the early part of 1938. Its cost is

estimated at $3,000,000.00. Yes, if you assume that it were run constantly, which was not the intention in installing it, its output would be more than the hydro-electric plant proposed at Buzzard Roost. It would be about four times as much—but it is not intended that the new unit be run constantly. Previous to the unit now being installed the last increase the Duke Power Company made in its generating facilities was the installation of the first two units at River Bend. We have not built any hydro-electric plant since that time. We bought energy from Lexington which began coming in in 1930.

The undeveloped power sites that I spoke of were acquired over a period of years. Some of them were acquired a considerable time back, even before my time. Some of them have been acquired recently. Yes, possibly within the last five or six years.

I am not in a position to say whether the amount of power which Greenwood County hydroelectric plant will be able to sell our customers will seriously damage the Duke Power Company, because I assume that question would concern the business end and I am not conversant sufficiently with the business end to express any opinion.

RE-DIRECT EXAMINATION.

The paper entitled "Kilowatt Hour Output Consolidated, North & South Carolina, 1928-36, incl." gives figures showing the amount of power generated by the Power Company and not the amount sold. There was also marked as an exhibit for defendants a set of figures for (630) the same years showing sales. The difference between the figures shown as output for the years 1928 to 1936 and the figures showing sales in kilowatt hours for those same years, represents losses in transmission, and also includes use around the power plant for auxiliary purposes. This total loss will be about twenty per cent for the system.

Mr. W. S. O'B. ROBINSON, JR.: That brings us to the question of the status of the evidence taken prior to the entry of the final decree, which was taken by Mr. Walters, a Special Master. It is our position that all of the evidence, both the evidence for the plaintiffs and the evi-

dence introduced by the defendants before Mr. Walters, taken by him and reported to the Court, became a part of the record. And if on this trial your Honor rehears the issues determined by Judge Watkins, in addition to trying the questions as to any subsequent change, that evidence being a part of the record, it is to be considered. Because this being an equity case, where evidence is taken, it becomes a part of the record. It is not like a law case where a new trial means the reintroduction of all the evidence.

Mr. D. W. ROBINSON, JR.: If your Honor please, I may be able to shorten this. We are not in accord with Mr. Robinson with regard to the law. However, we are perfectly willing for the old record to go in, provided we have the right under the issues as now made to make such objections to any part of the testimony that we would care to.

The COURT: All right. Now, so much for that testimony that was taken before Mr. Walters, the Special Master. Then we come to the second class of testimony that is in the history of this case, that is the testimony that was taken before Judge Watkins in Spartanburg. Now my conception is that testimony would come initially before me, with the duty of ruling as to its relevance and competency and so forth.

(631) Mr. W. S. O'B. ROBINSON, JR.: Exactly Your Honor, that is the way I understand it. We have covered that testimony in the second paragraph of the stipulation, and that testimony may be used by either party just as though it were a deposition.

Mr. D. W. ROBINSON, JR.: My understanding is that your Honor has ruled that the evidence taken and reported by the Special Master before Judge Watkins' original injunction decree as such evidence is contained in the printed record is before the court, subject to any new objection we might make, together with all exhibits introduced before the Master, Mr. Walters, whether such exhibits are printed or not.

The COURT: That is right.

Mr. D. W. ROBINSON, JR.: Shall I state my objections to the testimony which is in the old record? I have outlined my objections to portions of the testimony.

The COURT: Did you raise your objections before Judge Watkins?

Mr. D. W. ROBINSON, JR.: Some of them.

The COURT: Did he rule on them?

Mr. D. W. ROBINSON, JR.: He made no definite ruling. I moved before Judge Watkins to strike the engineering testimony.

I think there were two classes of objections I made. One was hearsay and one was an objection going to the entire testimony, the engineering testimony. I want to urge those objections before your Honor and there is one other objection which was not noted before Mr. Walters that I wish to make with the privilege of the Court here. so I can easily call them to your Honor's attention, if that is the proper procedure.

The COURT: Go ahead.

Mr. D. W. ROBINSON, JR.: Well, with respect to the engineering testimony on which Judge Watkins commented on the bottom of page 475: "On that point, Mr. Robinson, my present view is this: that in the making up of those estimates, where there is substantial evidence (632) at all to support the finding of the administrator, the Court ought not to interfere with it; that there is a large discretion in those matters and that the Court certainly would not interfere with the exercise of a discretion that is not unreasonable", and he ruled with us on that point.

The COURT: I think that is right and I will rule that way on that evidence here. Let's get that specific. The Court adopts the language appearing at the bottom of page 475 of the record, starting with the words: "The Court: 'On that point, Mr. Robinson, my present view is this," and ending with the words "That is not unreasonable", at the end of line 6 on page 476, (quoted above). The Court takes the view that the ruling of His Honor Judge Watkins was very clearly correct, and is at least approved by inference from the opinion of the Circuit Court of Appeals.

Plaintiffs objected to this ruling. The Court overruled the objection. An exception was taken by the plaintiffs and allowed by the Court.

Mr. D. W. ROBINSON, JR: There are one or two other parts of the original testimony on page 173 of the transcript, the original stenographer's transcript, pages 173 and 180, the testimony of Mr. E. C. Marshall. We objected I believe at that time, and we object now to Mr.

Marshall expressing an opinion on whether the County could build its plant without the loan and grant agreement upon the ground that the answer to that question would be an opinion with respect to which Mr. Marshall is not qualified to express an opinion and that it is irrelevant.

The COURT: It is a very small matter, but I reckon that is right, yes, sir, I reckon that would be stricken out. In other words, you take the position he hadn't qualified as an expert on the financial power of Greenwood County.

Mr. D. W. ROBINSON, JR: I don't believe the witness should be alowed to give his opinion on a matter of whether we could sell our bonds if he was not qualified.

The COURT: Well, I am ruling with you on that.

Mr. W. S. O'B. ROBINSON, JR: Now on page 180, as I understand it, your Honor is excluding the answer, "I don't believe it would be possible to sell them."

The COURT: I think that is probably true. There is no showing Mr. Marshall was an expert on county administration and sale of bonds and things of that kind. Furthermore than that, I think it is irrelevant.

Well, I think it is a very small matter and I think it is irrelevant and I am going to grant his motion to exclude it. I don't think it makes a great deal of difference. The issue in this case is not between municipal plants and one aided by the government. The fact one of them might be able to finance it, they have been financed before, the fact Greenwood County probably has a pretty large outstanding indebtedness, not such a terribly rich county, although a very fine place and a fine county, I don't see where that would make any difference in this case.

Mr. W. S. O'B. ROBINSON, JR: What is the extent of your Honor's ruling?

The COURT: I think starting with the question, "Mr. Marshall, if Greenwood County did not have the benefit of this federal financing, etc., what do you say as to whether the county would be able to finance that project?" I say from there down to the cross examination I think we will strike out.

Mr. W. S. O'B. ROBINSON, JR: If your Honor please, we don't object where he has the objection, "I don't believe it would be possible to sell them", but the other questions and answers to which there were no objections

taken at the time—and what we are trying to bring out there was if the county didn't have this grant of 30% behind the revenue bonds and was undertaking to issue revenue bonds to build this plant, that it would not be able to sell the bonds because there would be nothing behind them, and endeavoring by that line of evidence to support our position that the real cause of our injury is this federal subsidy here behind the grant.

The COURT: All right. Mr. D. W. Robinson, what do you say about that? He says I ought to stop in my exclusion down there at the words, "I don't believe it would be possible to sell them."

Mr. D. W. ROBINSON, JR: If your Honor please, I think he gives the substance of his reasoning further down. I think it is just as objectionable as his original conclusion.

The COURT: Well, if you gentlemen require me to rule I am going to rule it all out on the ground not so much that it is an opinion but it is irrelevant.

(To this ruling Plaintiffs objected. Exception was duly taken and allowed).

Mr. D. W. ROBINSON, JR: Now, if your Honor please, we wish to exclude the portion of Mr. Clarence E. Rose's cross examination contained I believe on page 299 of the printed transcript in which Mr. Rose goes into some discussion which might be construed as expressing some opinion on the policy and motive of the Public Works Administration.

The COURT: Well, the Circuit Court of Appeals said they didn't consider it anyhow, didn't they?

Mr. D. W. ROBINSON, JR: Well, I think in substance they said that.

The COURT: They said a cabinet officer would not be held responsible—I don't know the exact words they use—for some man who didn't fully understand the purview of his authority. That is what they said. I won't strike it out but I will let it stay in and have in mind what the Circuit Court of Appeals said about it when I go to rule on it. And furthermore Mr. Ickes testified fully a repudiation of—how far his repudiation is correct that is just one of those difficult things, the weight of evidence—the theory is at least the chancellor will be able to ferret it out and decide intelligently. Cer-

tainly the Circuit Court of Appeals has felt it can safely say it will follow Mr. Ickes' statement rather than Mr. Rose. With their guide I think I can do the same thing.

Mr. D. W. ROBINSON, JR: Those are all the objections I have.

The COURT: Well, I am not going to strike out the cross examination of Mr. Rose, because I think that under a liberal view of cross examination it was responsive to matters raised in direct, and that ruling must be understood in connection with the fact that Mr. Ickes himself later testified as to the scope of Mr. Rose's authority. Furthermore the matter was of such importance in the case for the attention of counsel on both sides to be focused on it, so much so that it must have been mentioned in the argument in the Circuit Court of Appeals. This Court cannot see how it would be abusing its discretion in leaving in testimony in here for whatever it is worth. That is my view about it, gentlemen, right or wrong.

(To this ruling over objection exception was duly taken by Defendants and allowed).

Mr. D. W. ROBINSON, JR: The time has come for me in order to make the record clear to move to strike the testimony which we have objected to of various witnesses that have been introduced yesterday and today on the ground that we noted at that time, and upon the further ground that that testimony is not responsive to any new issue which has come up in the case since the pleadings were amended.

I think the plaintiffs take the position the situation is the same as it was then and we submit that this new testimony is not responsive to any new issue in the case. I would like to move to strike it all out.

Mr. SCOTT: We join in the motion of the County to strike.

The COURT: I will overfule both motions and won't burden myself or counsel with a restatement of the various reasons I have in mind in refusing to grant those motions. I think the testimony is admissible. That is my honest view on it, gentlemen. I think it is admissible on the various grounds I stated.

Mr. D. W. ROBINSON, JR: If your Honor will allow

us an exception, and the government joins in the objection I made to various parts of the whole record.

The COURT: All right sir. That is understood. Exception taken and allowed.

Mr. D. W. ROBINSON, JR: I think for the benefit of all counsel that perhaps I would like to see if my understanding is correct. My understanding is that your Honor has ruled that the old record taken before Judge Watkins' original injunction orders as contained in the printed record is before the court, subject to any new objection we might make.

The COURT: That is right.

Mr. D. W. ROBINSON, JR: Both the government and myself made objections to it yesterday, and in addition to that, certain exhibits which were not printed but which were introduced before the Master, Mr. Walters, in Greenville, are also in the record; all the exhibits whether they are printed or not. I think that clears up that matter.

Mr. DEMPSEY: Is it your Honor's ruling that the Supreme Court Record or the record presented to the Circuit Court of Appeals is now before the court?

The COURT: We discussed that and it is the record that went to the Circuit Court of Appeals.

Mr. D. W. ROBINSON, JR: The record that went to the Court of Appeals, so far as concerns the original evidence taken before the Special Master, is the same as the record that went to the Supreme Court. We have agreed among ourselves to use the narrative as printed in the record rather than the long transcript made before the Special Master.

The COURT: Is that agreeable to you Mr. Dempsey?

Mr. DEMPSEY: Yes, sir.

The COURT: We are using the copy of the record (633) that went to the Circuit Court of Appeals.

Mr. D. W. ROBINSON, JR: As I understand it we are using the narrative of the testimony of J. N. Stribling, J. E. Willoughby, E. C. Marshall, J. E. Sirrine, W. G. Perry, George Wrigley, C. P. Roberts, F. H. Cothran, W. D. Faucette and M. R. Kimbrell, witnesses for the plaintiffs as it appears in the printed transcript of the record for the Circuit Court of Appeals beginning on page 157 and extending through page 263. We are using the narrative of the testimony of defendants' witnesses J. W. Barnwell, D. T. Duncan, G. R. Barksdale, F. H.

Sweeney, J. G. Wardlaw, F. H. H. Calhoun, A. C. Bruce, Clarence E. Rose, W. A. Barnett, R. E McCaslan, J. C. Smith, S. M. Leaman, J. H. Milford, M. G. Boyle, M. C. Willard, Emmett I. Davis, and J. B. Sloan, as it appears in the record at pages 264 to 316; and the narrative of the testimony of plaintiffs' witnesses in rebuttal J. M. Costello and Charles S. Reed, as it appears at pages 316 to 324 of the record. We are also using plaintiffs' exhibits Nos. 1 to 45, inclusive, and defendants' exhibits 1 to 67, inclusive. Excerpts from these exhibits were, for convenience, printed as a part of the record for the Circuit Court of Appeals and appear on pages 324 to 474 of the record. It is understood, however, that the original of these exhibits are before the court and may be used.

Mr. W. S. O'B. ROBINSON, JR: That is my understanding.

The COURT: That is right.

Mr. W. S. O'B. ROBINSON, JR: We have a few other exhibits we will want to introduce as soon as we can check over them.

The COURT: You may offer them later on.

Mr. W. S. O'B. ROBINSON, JR.: With that permission the plaintiffs close.

(634) **DEFENDANTS' EVIDENCE.**

Mr. DEMPSEY: I offer as defendants' exhibit 70 for identification a letter dated March 22, 1934, from the Administrator of Public Works which was written pursuant to a Senate Resolution requesting a report of the business of the Federal Emergency Administration of Public Works.

I offer as defendents' exhibit 71 for identification a letter from the Administrator of Public Works written pursuant to a resolution of the Senate requesting a list of non-federal projects approved by the Administrato. but for which allocations have not been made because of lack of funds, and a list of non-federal projects not yet approved by the Administrator, the lists to indicate as to each project, its location, type, estimated cost, the amount of loan requested and the amount of grant requested.

I offer as defendants' exhibit 72 for identification a letter from the Administrator of Public Works dated

March 6, 1936, written pursuant to a resolution of the Senate directing the Administrator to report a list of all projects involving the generation, transmission and distribution of electric power and gas for which allotments had been made by the Public Works Administrator and to indicate which projects were under construction and which had been delayed because of litigation.

I offer as defendants exhibit 73 for identification a letter from the Federal Emergency Administrator of Public Works in response to a Senate Resolution requesting a list of non-federal projects pending in the Federal Emergency Administration of Public Works, the list to indicate as to each project its location, its type, etc.

I offer as defendants' exhibit 74 for identification a document printed by the Government Printing Office, entitled "Extract from Hearings before the Sub-Committee of the Committee on Appropriations, United States Senate, 74th Congress, Second session on H. R. (635) 12624."

I now offer in evidence the foregoing exhibits 70 to 74 inclusive.

Mr. W. S. O'B. ROBINSON, JR: Plaintiffs serverally object to the introduction of each of these exhibits on the grounds that they are hearsay, self-serving declarations; irrelevant, incompetent, and immaterial; and insofar as they may set forth facts concerning this case such facts should be presented by witnesses having knowledge of them. Plaintiffs object to defendants' exhibit 70 on the additional ground that it does not relate to any change supervening since the entry of the original decree and if admissible at all was admissible on the original hearing.

The COURT: The objection is overruled and the exhibits are admitted in evidence..

Mr. W. S. O'B. ROBINSON, JR.: Plaintiffs desire an exception to the admission of each of the exhibits.

The COURT: The exception is severally allowed the plaintiffs to the admission of each of the exhibits.

Mr. DEMPSEY: I offer as defendants' exhibit 75 for identification an official Government Publication printed by the Government Printing Office, entitled "Revenue Bond Financing by Political Subdivisions, Its Original Scope and Growth in the United States". This was prepared by the Public Works Administration and in a

large part discusses the experience of the Public Works Administration with respect to revenue bonds. I offer it for the purpose of showing that revenue bonds do constitute reasonable security of an investment depending upon circumstances of the case.

The COURT: I think it is beyond the bounds.

Mr. DEMPSEY: May we have an exception?

The COURT: Exception taken and allowed.

Mr. DEMPSEY: I offer as defendants' exhibit 76 for (636) identification a reprint by the Government Printin Office from the Monthly Labor Review, issue of October 1936. It is an article entitled "Employment created by PWA construction".

The COURT: I don't think it is admissible as evidence in this case.

Mr. DEMPSEY: May we have an exception?

The COURT; Exception taken and allowed.

Defendants introduced in evidence as defendants' exhibit 77 a mimeographed copy of order 73 signed by Harold L. Ickes, Administrator of Public Works, installing the Electric Power Board of Review. This exhibit is the same as plaintiffs' exhibit no. 46.

Mr. DEMPSEY: I offer as defendants' exhibit No. 78 for identification mimeographed copy of order No. 141 signed by Harold L. Ickes, Administrator of the Public Works Administration. It is an order dated March 16, 1936, dissolving the Electric Power Board of Review and is offered only for the purpose of showing that the Board was dissolved.

The COURT: Exhibit is admitted in evidence.

Mr. DEMPSEY: I offer as defendants' exhibit No. 79 for identification a memorandum entitled "Memorandum for Mr. Hunt from the Administrator dated January 20, 1935", signed with the initials "H. L. I."

Counsel for plaintiffs: Plaintiffs object to the introduction of the exhibit upon the grounds heretofore stated in their objection to defendants exhibits 70 to 74, inclusive.

The COURT: The objection is overruled. The exhibit is admitted in evidence.

Counsel for plaintiffs. May we have an exception?

The COURT: Exception taken by plaintiffs and allowed.

Mr. DEMPSEY: I offer as defendants' exhibit No. 80 for identification an original letter from Harold L. (637) Ickes, Administrator of Public Works to the City of Coeur d'Alene, Idaho, with an attached enclosure consisting of a proposed loan and grant agreement between the United States and that City. The date of the letter is March 16, 1936, a copy of which is hereto attached.

Mr. W. S. O'B. ROBINSON, JR.: Plaintiffs have been asked to waive the question of the authenticity of this letter. We do waive that question. We would like to have it stipulated in the record as a part of our objection to the letter that it was made the basis of a motion filed by the Secretary in the United States Circuit Court of Appeals for the 9th circuit in the case of *Washington Water Power Co.* vs. *City of Coeur d'Alene, et al.* The motion was for the remand of the case to the district court. While the motion was pending and before it was acted upon Mr. Ickes, who was appellant in this case, withdrew his appeal. The letter was a part of the motion.

Mr. DEMPSEY: That is right.

Mr. W. S. O'B. ROBINSON, JR.: Plaintiffs object to the introduction of the letter upon the ground that it is hearsay; is a self-serving declaration; and that it was written after the litigation had arisen in the Coeur d'Alene case as well as after the litigation in the case at bar.

The COURT: But you produce letters that Mr. Ickes wrote to your witnesses. Of course, it is true you produce the witnesses here.

Mr. W. S. O'B. ROBINSON, JR.: I do not think it is proper evidence in reply to the evidence we introduced Mr. Ickes being a party to this suit, statements by him are admissible as admissions or statements against interest. But, of course, that same rule does not apply to this letter offered by him.

The COURT: I will admit it.

(638) Mr. W. S. O'B. ROBINSON, JR.: We wish to enter an exception.

The COURT: The exception is taken by plaintiffs and allowed.

Mr. DEMPSEY: With respect to this and other ex-

hibits relating to the line of testimony which is now in evidence you understand we don't waive any objections to that testimony.

The COURT: Certainly I understand. This evidence is offered for the defendants Ickes without waiving their rights to object to the Couer d'Alene, Post deposition we will call it, with respect to the Couer d'Alene property.

Mr. DEMPSEY: I should also like to note that it is our contention that we never had tried to control these rates and we have not had a change of policy in that respect and I want it not to be understood that we agreed.

Defendants offered and the Court admitted in evidence the following exhibits:

Defendants' Exhibit No. 81, being a letter dated August 13, 1934, from Mr. D. E. Byerley to Col. Henry M. Waite, Deputy Administrator.

Defendants' Exhibit No. 82, being a letter dated April 4, 1935, from Edwin Vennard to Henry T. Hunt, Chairman, Electric Power Board of Review.

Defendants' Exhibit No. 83, being a mimeographed copy of the offer dated December 31, 1935, by the United States of America through the Federal Emergency Administration of Public Works to the City of Dowagiac to aid in financing the construction of an electric generating plant and distribution system.

Defendants' Exhibit No. 84, being a copy of an offer dated January 15, 1936, made by the United States of America, through the Federal Emergency Administration of Public Works to the City of Sandusky, Ohio, to aid in the financing of the construction of an electric generating plant and distribution system.

(639) (To those parts of the following evidence of defendants which is enclosed in brackets, as hereinafter shown, the plaintiffs duly objected—in addition to the objections specifically shown—upon the grounds that said evidence does not relate to any change supervening since the original hearing or the entry of the original decree in this case; but related to matters heard and determined on the original hearing and is irrelevant and immaterial. The objections were overruled by the Court and exceptions were duly taken by plaintiffs and allowed

by the Court to each and every part of such evidence. It is agreed by counsel for defendants, with the approval of the court, that said objections and exceptions need not be separately stated.)

Defendants introduced the testimony of Harold L. Ickes taken before Judge Watkins at the hearing in Spartanburg on December 12, 1935, this testimony being introduced as a deposition, under the stipulation set forth at the beginning of this narrative, the testimony being as follows:

(640) HAROLD L. ICKES, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. FRANK:

I am Secretary of the Interior of the United States and also Federal Emergency Administrator of Public Works. I am a member of the Illinois Bar and have practiced law in that state for many years. Horatio B. Hackett is Assistant Administrator of Public Works. I am familiar with his signature having seen him write it a number of times. The contract dated November 30, 1935, between Greenwood County and the United States of America was signed by Mr. Hackett. I specifically authorized him to execute the contract and approved the contract and do now approve it.

Contract referred to dated November 30, 1935, was admitted in evidence as Defendants' Exhibit No. 86.

This contract, Defendants' Exhibit No. 86, contains all the understandings and agreements of whatsoever kind between me and the County of Greenwood. The Public Works Administration of The United States Government has no other arrangement of any kind with Greenwood County relating to the project, which is the subject of the contract.

(As to whether I, as Administrator of Public Works or the United States, or both, intend to exercise any control or influence of whatever kind, over the rates to be charged by Greenwood County, and its proposed plant,

so far as the Public Works Administration and the United States Government are concerned the answer is "no". As bondholders, the situation might arise where we would be very much interested in the rates. My interest in that respect would be strictly limited to that of a bondholder—such interest as any bondholder would have under the laws of South Carolina.)

(641) The bonds referred to in this contract (Defendants' Ex. No. 86) are revenue bonds. The security behind them is the earnings of the proposed power plant.

(Under the statute under which I am operating, Title II of the National Industrial Recovery Act, my interests in these earnings is that they shall be at least large enough to give reasonable security for our investment.)

(I have no interest in the rates of the County's competitors because of our investment in the County's plant. The fact that the rates of plaintiffs' were high or low might indirectly affect the security of the County's bonds. If the plaintiffs reduced their rates below the cost of producing and supplying current and the County had to meet these rates in order to hold its customers, it would have indirectly an affect.)

(Other than that which I have just indicated, neither I nor the United States Government has any interest in plaintiffs' rates.)

I have had called to my attention the opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Arkansas-Missouri Power Company* vs. *City of Kennett, Mo.*, reported in 78 Fed. Rep. (2d) 911, and I have read at least a part of it. Mr. Foley, Director of the Legal Division of the Public Works Administration, called the opinion to my attention the latter part of August. He did so because from the point of view of our power projects the decision was rather disturbing. It seemed necessary to make some revision in our contracts in order to meet the objections stated in the opinion of the court. We discussed the opinion in general terms and I authorized him to go into the whole

matter in the light of the opinion, take up the matter with the engineering and other divisions of the Public Works Administration, and see whether a contract could (642) be drafted which would stand the test of this opinion. Such a revised form of contract was subsequently approved by me, the latter part of September. I do not think that was a very long time to draft a contract of that importance.

After I approved this contract, contracts in the new form were sent out to cities in a number of instances and lead to the reformation of the contract in some instances. There was a substitution in the case of the City of Hominy, Okla. There were some more. I don't happen to remember all the names; possibly fifty all together.

My recollection is that the revised form of contract was called to the attention of the Court of Appeals for the District of Columbia in litigation relating to the PWA contract with the City of Hominy and lead the Court of Appeals to remand that case to the lower court.

The form of contract which resulted from the circumstances to which I have referred has been modified subsequently. This occurred as a result of the decision of this Court in the Greenwood County case. The decision seemed to rest on other grounds than those on which the decision in the Missouri case was based so it seemed necessary to have a further revision. This was called to my attention early in the first half of November. Prior to that time I had been told the substance of the opinion. I don't recall that I had ever read the opinion at that time. I have since.

It seemed to me in the Greenwood County case that His Honor based his opinion, more or less, upon the assumed reservation of power in the Public Works Administration to regulate rates after the project was built. I may say for the record—I may say on the basis of the record thaa went in here, that his Honor was entirely right. I have reference to certain testimony that went into the other case which standing by itself, uncontradicted, that we had made certain reservations.

(643) I am referring to the testimony of the witness Rose. As a result there was work done and a further revision of the former contract. I urged that the revision be hastened and did everything possible to hasten it. The work was completed about the latter part of

November. I don't know when it was submitted to the Greenwood County authorities. It was executed on the 30th of November.

Q. Were your intentions and purposes under the former contract with Greenwood County—contract of December 8, 1934,—in any way substantially different from what you have just indicated?

Objection by counsel for plaintiffs on the grounds that the question does not relate to any change supervening since the orignal hearing and the entry of the original decree in this case; but relates to matters heard and determined on the original hearing of the case, and is irrelevant and immaterial to any matter properly before the court on the retrial.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. None at all.

Q. I call your attention to Senate Document 169, 73rd Congress, second session, or a copy of the same, being entitled "Letter from the Administrator of Public Works pursuant to Senate Document No. 190, a report of business of the Federal Emergency Administration of Public Works for the period ending February 15, 1934". Such letter being dated March 22, 1934. And ask you to turn to page 9 of that report headed "Part III Policy of the Public Works Administration". The first sentence reads: "The fundamental purpose of the Public Works Administration is to relieve unemployment and increase purchasing power through the construction of useful public works, thereby increasing the production of goods and also providing employment in the capital goods industry." Is that a correct statement of the policy of the Public Works Administration?

(644) Objection by plaintiffs on the ground that the question is leading and also on the other ground stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. It is.

(Senate Resolution No. 190 is quoted on the fly-leaf of Senate document 167, Deft.'s Ex. 70. Subsection (3) is the request from the Senate for a statement of the policies of the Public Works Administration. This entire document was intended to be in response to that resolution, and included this Subsection (3).)

(This document includes the statement "of a large number of projects, applications for which were made to me by municipalities".)

(In no instance did I solicit specific applications. The applications came voluntarily from the community that wanted the Public Works project, accompanied by engineering and legal data. Sometimes it was *incomeplete* and we had to send back for additional information, but it was always initiated by the local community. I am referring now to non-federal projects.)

(645) (Of the total aggregate of non-federal projects, measured in money terms, I cannot say accurately what percentage consisted of accepted applications relating to competitive municipal power projects, but I would say that it would not exceed 2% or probably less. In general terms some of the various kinds of non-federal projects covered by accepted applications consist of courthouses, school buildings, sewage projects, water works, street paving, public buildings of various sorts, a great many school houses and college buildings. I think that any type of structure that is used for municipal service you can include in the list of applications we had.)

(Neither I nor the Public Works Administration nor the United States Government initiated or instigated or induced the making of applications for competitive power projects. We did not in the particular case of Greenwood County.)

Q. On the question as to the merits of the projects of that type in the general category of which the Greenwood County Project is one instance, did you, or do you, *weight* any considerations other than those involved in other types of applications?

Objection by counsel for plaintiffs on the grounds noted above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. No, we consider them all on the same basis and applied the same principles on all of them regardless of the project.

(The primary considerations were social desirability, ability of the community to finance its share of it and its relationship to the question of unemployment.)

(Where the municipality was proposing to borrow money from the Public Works Administration on general revenue bonds we did not give any consideration to the rates of the project.)

Q. To what extent if at all were you interested in (646) the question of comparative rates to be charged by a proposed public utility to be operated by the municipality, as compared with the rates charged by private existing companies with which the city or municipally-owned project would have to compete, where the bonds were revenue bonds.

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. Well our interest in revenue bonds was whether or not—our interest in the matter of rates with reference to projects, where we took revenue bonds, simply went to the question of whether or not the rates to be charged would pay our loan within the time limited in the contract.

Q. In connection with the application of Greenwood County, did you take into account other considerations—considerations other than those to which you have heretofore referred?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. No.

(When an application came to me with the approved findings by the three various divisions of the Public Works Administration, I approved it without further question. I think practically in every case. There may have been some exceptions where I had personal knowledge of the project and therefore wished a personal opinion. If there was a difference of opinion between the divisions—and that arose in a number of instances, for instance the project would come with the approval of the engineering staff and with the approval of the legal staff, but the finance division would disapprove it—then I would call in the heads of the divisions and they would state their case to me. Sometimes I would refer it to the Board of Review, and sometimes after the Board of (647) Review had passed upon it, it would come back to me.)

(No one other than myself was authorized to determine the policies of the Public Works Administration except the President. This same answer applies to the question as to whether anybody other than myself was authorized to express the policies of the Public Works Administration.)

There was an employee on the staff of the Public Works Administration named C. E. Rose. His duties were and are those of an examining electrical engineer. (He had no authority in the final approval of applications. It was merely his duty to investigate and report the facts.)

(He had no authority to formulate, or to participate in the formulation of the policies or the manner in which applications should be passed on.)

(He was not authorized to fix the rates of municipally owned projects.)

Q. Did he have any authority to speak for the Public Works Administration with respect to questions of policy?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. He was not authorized to speak for the Public Works Administration with respect to anything, policy included.

Q. Have you read the testimony given by Mr. Rose in this case?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. Yes, I have.

Q. Have you any comments to make with respect to it?

Objection by plaintiffs on the grounds as stated above and on the additional ground that Mr. Ickes was not entitled to contradict the previous testimony of the witness, Rose.

(648) COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. Well, I think he was suffering from delusions of grandeur. He had no authority to expound, or determine or say, what the policy of the Public Works Administration was and he certainly undertook to do that in large measures.

Q. Was his testimony with respect to the rates of Greenwood County or the plaintiffs in this case, a correct statement of the policy, intentions, or purposes of the Public Works Administration?

Objection by plaintiffs on the grounds as stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. No, it was not. He may have been right on his figures on rates, which I am not competent to testify in respect to, but on policy he was not correct.

Q. Was his testimony with respect to the policy of the Public Works Administration concerning rates, so

far as it differs from your previous testimony as to the policy of the Public Works Administration, correct?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. No.

This testimony of Mr. Rose was first called to my attention very recently. I cannot fix the precise date.

The contract of December 8, 1934, contains a provision reading as follows: "The Government shall be under no obligation to pay for any of the bonds or to make any grant if the borrower shall not have adopted a resolution satisfactory in form and substance to the (649) Administrator, providing for rates to be charged for services afforded by the Hydro-electric System."

(The meaning of this provision was that we had no intention of lending the Government's money on this project unless we had at least an initial assurance that the rates charged would be sufficient to pay the bonds that we bought with interest. I think the language is clear. "Shall not have adopted" does not refer to the future at all. There is no reservation of future power in that section of the contract.)

Q. I call your attention to Plaintiffs' Exhibit #35 in this case, or to a copy of the same, a press release dated September 24, 1934, of the Federal Emergency Administration of Public Works, and have handed you the same. Are you familiar with the terms of that press release?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. I am.

Q. Does it correctly set forth your policy in passing on applications for competitive electric power projects?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. Not standing alone.

Q. Insofar as it differs from your policy as stated in your testimony given today, which would be the more accurate; your testimony or that press release?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. The testimony I am giving today more accurately (650) reflects the policy of the Public Works Administration.

Q. Then at the time of the issuance of that press release?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. It does.

(Neither I nor the Public Works Administration nor the United States Government were intending to engage in the operation directly or indirectly of the Greenwood County power project after it was built under the contract of December 8, 1934.)

Making the assumption that the net amount of the loan in this case is approximately $2,170,000.00 and the grant not more than $682,000.00, so that the aggregate of the loan and grant is $2,852,000.00, that portion of the aggregate amount which consists of the loan would be paid off in yearly payments. On each due date when the coupons fall due the interest would be paid, and there would be payment by amortization of the principal over the life of the loan. The bonds bear interest at the rate of 4%. If the loan is paid out according to its terms, the Government will receive the full amount of the loan

and the grant with a nominal interest rate, which I think has been figured at 1.6%. I could have made a loan of the total amount instead of making part loan and part grant. In some cases we did make loans instead of loans and grants. I could, under the law, in my discretion or under the executive order of the President have made a loan of the full amount with interest at 1.6%.

Mr. W. S. O'B. Robinson, Jr.: If your Honor please this cross examination is made subject to the exceptions to the evidence heretofore taken by plaintiffs and without waiving any of such exceptions.

The Court: All right, sir.

Cross Examination.

(651) This suit was started before this Court November 7, 1934. At a press interview in Washington on November 22, 1934, I referred to a former suit that had been instituted in the Supreme Court of South Carolina by a state taxpayer to test the validity of this project and stated that the Duke Power Company was seeking two days in court. In making this statement I intended it to be understood that the Duke Power Company was unnecessarily delaying this whole matter, holding up the spending of this money which had been appropriated by Congress to give employment. I was informed that the Duke Power Company had either been a party litigant in the suit before the State Court or had intervened and therefore had a standing before the court. I did not know that the Duke Power Company had attempted to intervene and had been denied the right of intervention. The President of the Duke Power Company wired me on November 23rd and I don't recall whether I have replied to that telegram. My special assistant acknowledged it on November 27th and I don't know whether that was the only notice given to it or not.

(652) I do not recall whether at the same interview I stated: "I don't agree with the Duke Power Company. I think they have been charging unfair rates." I may or may not. If you are relying on the published report I would want something more authentic than that. I did

not at the time keep minutes of press conferences. I do now because I have been so frequently misquoted.

I recently published a book entitled "Back to Work", with the sub-title "The Story of PWA". It was published in June, 1935, and the date of the preface is May 15, 1935. It was published after the decision of this Court on the motion to dismiss which was rendered in April, 1935. In this book I have a chapter, Chapter 6 entitled "Cheap Power".

(653) On page 140 after making some remarks about power companies, I say: "Yet as might be expected, there has been bitter opposition to our acting favorably on requests for funds to build municipal utility systems. Subterranean influence has been brought to bear and every sort of legal obstacle has been thrown in the way of such loans. The private utilities by direct frontal or by flank attacks have held up many projects month after month. Typical of the resistance put up by the private companies to public ownership of utilities is the somewhat long but illuminationg story of the Greenwood County project at Buzzard's Roost South Carolina."

Q. Then turn over to page 146.

WITNESS: There is some intervening matter on page 143.

COUNSEL: We will get to the intervening matter.

On page 146 I say: "PWA asked the county to hold up construction until the State Supreme Court could rule on the matter. As the result of a test suit, the county was given the right by the court to go ahead with the project. Although this suit gave it its day in court, the Duke Power Company was not satisfied; it wanted two days. After trying in vain to persuade the State courts to delay the project, the Duke Interests asked the Federal courts for an injunction."

I believed the Duke Power Company was in the State case directly or indirectly. You cannot always prove that a public utility is in court, when a taxpayer is ostensibly party plaintiff. As to whether I can give you any facts upon which I based the charge made in my book, it was made on information and belief. I don't recall what in-

formation I had. It may have been the fact that it was apparently a taxpayer suit.

On page 143 of my book, I state, referring to the County project "The fact is that it was proposed to distribute more than 80% of the power to be developed at Buzzard's Roost to new industrial and rural customers at a reasonable rate, something the Duke Power Com-
(654) pany does not seem to be able to do". I meant to say there that the Duke Power Company's rates are not reasonable and I think I say so quite plainly.

As to what the Duke Power Company's rates are I could not say offhand, but a study was made of them. This study was made by the PWA engineers and financial experts who were working on this project. They looked into the Duke Power Company's rates. As to whether I examined or checked their studies of the Duke Power Company's rates or had done same when I made the statement contained in my book that they were unreasonable, my answer is "No" that I took the result of the members of my staff. I have already answered the question as to whether I had anything upon which to base my statement that the Duke Power Company's rates are unreasonable. Mr. Rose was one of the engineers that worked on this investigation of the Duke Power Company's rates for me. I don't know when he came into the case. He wasn't under my personal direction. I was interested in the Duke Power Company's rates because they had a bearing upon whether this project could be built and charge rates—sell enough power at those rates to liquidate its bonds to the Public Works Administration, with interest. It is true that the higher and more unreasonable the Duke rates were the better off we would be, so far as bondholders would be concerned, but that would not make the Duke rates reasonable.

I charged in my book that the Duke rates were unreasonable because I believed it. The unreasonableness of the rates was the concern of any individual; especially the concern of a government official in my position. As to whether the Railroad Commission of South Carolina has not performed its duty in regulating rates, counsel is trying to get me to do what he criticizes me for doing —making statements on uncorroborated facts. Yes, I made the statement in my book that the rates of the Duke Power Company were unreasonable. As to whether I

had any facts upon which to base my statement, I did have information.

At the time I published my book I had not looked at the report of the Federal Trade Commission on its in-
(655) vestigation of the Duke Power Company. As a matter of fact, I did not know that the Duke Power Company had been investigated by the Federal Trade Commission.

At the time I published my book I did not inquire into the facts to ascertain whether the project as then outlined and planned by the County and by the Public Works Administration would sell power to no customers except customers of the plaintiffs' in this case. The officials of the County merely showed that they would sell enough power to liquidate their indebtedness to us.

On page 144 of my book I referred to the hearing before the Power Board of Review, and said: "As might have been expected, officials of institutions receiving financial aid from the Duke Endowment, protested any action which might reduce the incomes of their institutions. If they sensed the injustice of levying enormous tribute upon the people in order that their own favored institutions might receive gratuities they gave no evidence of it". When I referred in the book to "the injustice of levying enormous tribute upon the people" I was referring to the rates which the Duke Power Company was charging its customers. That's the tribute. I have already answered the question as to what facts I had upon which to base the charge in my book that the tribute was enormous and unjust. I have already stated, in response to the question, that I had reason to believe that the rates charged by the Duke Power Company were excessive; based upon the cost of production.

Q. I am trying to find out what facts you had, not what beliefs you had. If you had any facts, I want them. A. May the Court please, I am perfectly willing to go over in magpie fashion, but I have gone over that dozens of times. I have admitted that I had no facts. I acted on information and belief.

Q. Yet without any facts, you were willing to make this charge in your book, and publish to the world that the Duke Power Company's rates were unreasonable and unjust? A. I still believe it, sir. I still believe they are unreasonable based upon information and belief.

(656) I cannot say that there has been any change in my attitude or feelings towards the plaintiffs in this case since the date of the final decree, August 26, 1935. Since the date of the entry of the final decree in this case there has been no change in the policy of the Public Works Administration. Since the date of the entry of the final decree in this case there has been no change in the aims and purposes of the Public Works Administration with respect to power—electric power.

My attention has been called by my counsel to what is known as Release No. 989, which was introduced in evidence in this case as Plaintiffs' Exhibit No. 35.

Q. Has there been any change in that policy, or that purpose, since August 26th, 1935? A. It wasn't written by—it was released by itself and as an entire document, taken in connection with subsequent releases and enunciation of policy.

Mr. FRANK: Objection.

The COURT: I think you can arrive at that, Mr. Robinson, if you ask if the purpose is correctly stated, first, and then ask if there is any change.

Mr. W. S. O'B. ROBINSON, JR.: I couldn't ask if it is correctly stated, because we can only investigate here something that has taken place since the final decree, and not go back of that.

The COURT: But you have to go back to answer whether there has been any change. You can ask if there has been any change in the purposes or policies of the Administration, in reference to the power rates before.

Mr. W. S. O'B. ROBINSON, JR.: And I understood him to say there had not been.

WITNESS: That is correct.

The COURT: That's what I understood him to say.

On page 122 of my book, I say, referring to undeveloped water power, "This wasted flow of water and the whole problem of cheap electricity in the United (657) States engaged the attention of President Roosevelt long before the people sent him to Washington as Chief Executive. Repeatedly he has emphasized the importance of a more thorough development of our water resources and a more widespread distribution of electric

power. Through PWA, he has begun a double-barreled campaign to secure both for the Nation. He has encouraged gigantic projects to tap some of our hitherto wasted water energy and he has instituted expert surveys to determine exactly what are equitable electric rates with a view to developing plans for future utilization of additional available water power".

Just below that, I say: "Acting under the Senate Joint Resolution of April 14, 1934, authorizing 'necessary funds to conduct an investigation regarding rates charged for electrical energy and to prepare a report thereon', the President allocated $300,000 from PWA funds to the Federal Power Commission to make a rate survey."

I say further: "The first report made by the commission gives a graphic picture of rates paid for residential electric service in all cities of 50,000 or more. It covers 191 cities, comprising 49 per cent of all residential customers, urban and rural, in the United States. Later reports will include all communities of 1,000 or more population in each State."

On page 124, I say: "An additional $400,000 was allocated to it from PWA funds"—that is, the Federal Power Commission,—"to prepare a 'comprehensive program of public works for conservation, development, control and utilization of water power for the generation of electrical energy and its transmission and/or distribution to consumers; and, in furtherance of the preparation of such program, to investigate, collect and record data concerning the present cost of generation, transmission and distribution of electrical energy; the data concerning the control and utilization of the National water resources including location, capacity, development cost and relation to markets of power sites; also data concerning the relation of the hydro-electric industry to other industries and to interstate and foreign commerce'."

(658) On the same page, I say: "In addition to the fundamental studies which are being made by the Federal Power Commission by means of its PWA financing, a grant of $100,000 was made at the President's suggestion to the National Power Policy Committee. This committee was established for the 'purpose of developing a plan for the closer cooperation of the several factors in

electric power supply, both public and private, whereby national policy in power matters may be unified and electricity be made more broadly available at cheaper rates to industry, to domestic and particularly to agricultural consumers; the committee is to be advisory to the President." The book clearly states the facts as to these matters.

On page 125 I state this: "Five hundred million dollars have already been allocated by PWA for definite projects to harness a portion of our potential water power. As we have seen, in the far Southwest, out of a deep canyon of the Colorado River, has arisen Boulder Dam; in the Northwest human ants are building the Grand Coulee and Bonneville dams on the Columbia River; in the valley of the Tennessee the war-time Wilson Dam has been brought into fuller use and the Norris and Wheeler dams are being rushed for completion in 1936. Mammoth power plants, with intricate generators large enough to supply whole cities, are being erected besides the dams; land is being cleared for huge reservoirs, and thick transmission lines are being strung up to carry to home and factory the low-cost electricity that is to come."

As to the statements contained in this book they are facts which I wrote as facts. The statements contained in the book are related as facts; that doesn't necessarily mean my own conclusions.

On page 126 of the book referring to the construction of dams generally, I say: "This activity is only the beginning of a national plan to increase the supply of electric power and to bring down its cost."

Q. And that is the fact, is it not—the activities to which you are referring in your book, the construction (659) of these plants, is part "of a national plan to increase the supply of electric power", and make it more widely available? A. Yes, I understand that the Administration is committing the crime of trying to decrease electric power rates.

I say further: "The desire to provide cheap electricity for the consumer has a social object since cheap electricity will raise, almost to a revolutionary extent, the standard of living in underprivileged homes". That correctly represents my views.

The COURT: He stated that all that correctly represents his views.

On page 129 of the book I refer to TVA and its activites and say: "This plan for social betterment is firmly grounded on the soil of good hard sense. It is almost as if the government said: We are going to harness the Tennessee and its tributaries by means of great dams and extract from its waters a gigantic supply of electric power. Then we shall distribute this power to as many people as possible at the least possible cost. Incidentally the cost here will serve as a yardstick by which to measure costs in other parts of the country."

On page 130 I state: "Altogether, it is expected that up to 300 million dollars will be spent in the Tennessee Valley in the course of the next six years, including power development and land renovation. PWA has approved loans and grants to cities which wish to build transmission and distributing systems so that they can make use of cheap TVA power. Ten million dollars have been earmarked for this purpose and one city, Knoxville, has been allotted $2,600,000 for the improvement and extension of its own system. Additional appeals for aid have been received from scores of towns and cities whose local governments are wishful for low cost TVA power, but which are unable to raise enough money to build a distribution system or buy out the existing utility that continues to charge unduly high rates."

On page 132 I refer to the Tupelo, Miss., project and say: "There the bills for electricity have been cut nearly in half since TVA replaced the private company."

(660) On page 134 of my book, I say this: "This is the picture in broad outline of TVA at the present time. Soon, it is to be expected, the idea will be extended to other sections of the country. Moreover, TVA—and this is one of the main reasons for its establishment—will provide a 'yardstick' for the measurement of similar rates in other parts of the Nation, with the result of forcing pretty generally a reduction of private utility charges."

This is in reference to TVA. All of this is in reference to TVA, that you have been reading for the last few minutes.

On page 135 of the book, I say: "This TVA enterprise has appealed particularly to the public imagination because of its magnitude and on account of the broad social concept that underlies it. Yet this is not the only front upon which the government, under its PWA program, has been advancing against those utility interests that have been exacting unconscionable tribute from the people of the United States for so many years."

This quotation correctly states the facts as I believe them to be. It correctly states my views as I believe them to be.

Q. And among those "utility interests that have been exacting unconscionable tribute from the people of the United States for so many years", you would class the Duke Power Company? A. I agree with you in that.

Q. No, I asked you if you would not so class the Duke Power Company? A. Yes.

Q. So the Duke Power Company was one of the utility interests to which you were referring, at least by inference, in that remark? A. It might have been. It isn't—strange as it might be, the Duke Power Company has not loomed particularly large in my horizon. It is one of the many power interests.

Q. I ask you if the Duke Power Company is not the only company that you make reference to by name? Did you name a single other one by name? A. I think I have a pleasant reference to Mr. Insull in my book, somewhere.

(661) Q. Oh, Mr. Insull. But here in this book, isn't the Duke Power Company the only power company? A. It may be. I may have given that name to make my point.

Q. Won't you tell me whether it is, or not, the only power company? A. I cannot answer that. I cannot say that it is the only power company. I have not been burning the midnight oil as counsel has recently.

In this chapter of my book I refer to and comment on utility companies which have sold securities to their customers and employees, which have issued securities generally on written-up ledger values, which have engaged in all sort of improper propaganda, and which have spent money for lobbying. As to whether I include

the Duke Power Company. in this class of utility companies I have no specific reference at all in those particulars. If the shoe fits it can put it on. As to whether I intended to put the shoe on it, the book speaks for itself. On page 135 of my book I say, "In addition to financing these and other great regional power projects, PWA has approved applications for loans and grants involving rural electrification".

On page 136, referring to loans and grants to municipalities for the construction of municipal plants I say, "Finally we have always given the private utility an opportunity to meet the city's proposed rates, and, if this is done, the city is afforded a second chance to lower still further its anticipated charges. But we have uniformly reserved the right to help a city which desires its own power plant even if the suggested rates will not be lower than those of the private utility". That correctly states my practice as Federal Emergency Administrator of Public Works in making loans and grants to municipalities.

Immediately following the above quotation I say, "It has been my position that there are definite intangible values flowing to a community that owns and operates its own utilities. A strong case can be made for the proposition that if the people of a community want to own their own public utilities and are able to finance them, they should not be denied that opportunity merely (662) because the rates necessary to be charged in order to pay overhead and to liquidate are equal to or perhaps even slightly in excess of rates already currently charged by privately owned utilities. We do not attempt to dictate to another what he may buy within his means even if we regard him as being extravagant. In addition to which, there is a considerable price which a municipality can afford to pay in order to rid itself of the domineering tactics and the corrupting influences too often resorted to in the past by private utility interests". This correctly states the P. W. A. policy.

As to whether I am in favor of municipalities owning their own plants, my personal view is that it depends upon the situation. In my own village of Winnetka, Illinois, we have owned and operated our own plant for a good many years with entire sanction and approval, including that of the greatest group of utility lawyers

living near Chicago. Some communities are so badly administered, their politics are so corrupt, they cannot be trusted to own and operate their own utilities, and in other instances they can.

In my book I discuss the protest which the Duke Power Company made before the Electric Board of Power Review, saying on page 141, that this protest "caused PWA to send the project to the Electric Power Board of Review for a thorough study". Col. Hunt was Chairman of that Board As to whether at the time the protest was referred to the Board I had already approved the allotment, and the President had already approved it, that would make no difference at all. We approved allotments in a good many instances where we rescinded the allotment thereafter on good cause shown. On page 142 of the book I say, referring to the hearing before the Electric Power Board of Review, "There it was discovered that the Duke Endowment, the Doris Duke Trust and the Duke Power Company, all creations of the late James B. Duke, the tobacco magnate, were so inextricably tied together that only a lawyer of unusual ability could unravel the legal skein into which they have been skillfully intertwined".

(663) In that statement I did not mean to charge that there was anything improper in the connection between these two trusts and the Duke Power Company. I merely meant that the Duke interests were clever enough to engage able counsel to represent them. On the next page of the book I undertake to give the stock ownership of these trusts in the Duke Power Company. I do not recall where I got that information. I think I must have gotten it from a report. I do not know. Just below the quotation last referred to I say, "The Duke Power Company was certainly letting its right hand know what its left was doing. It was making a practical application of the old adage that 'charity covers a multitude of sins'. Not only was it hiding behind the flimsy skirts of its own philanthropy, it was also raising a tremendous fuss over what would have been a loss of business of not to exceed one-third of one per cent if the Greenwood County project should go into operation". The sins I intended to charge the Duke Power Company with were charging excessive rates based upon its cost of production of elec-

tric power. It was the sin of excessive rates. I thought the Duke Power Company owed a duty to the public.

Q. And that is the sin you were charging it with when you said it was "hiding behind the flimsy skirts of its own philanthropy"? A. Well, it wasn't hiding its charity under a bushel.

On page 144 of my book I say, "Thus, as is often the case, a fine social enterprise was made to serve as a handmaiden to an anti-social purpose". The anti-social purpose to which I refer is the operation at excessive rates. I still believe now that the Duke rates are excessive. I haven't changed my opinion.

On page 146 of my book I state, "By January of 1935, twelve municipal power projects had been completed. Forty-eight others were under construction; thirty-four more had been approved by the power board, and about seventy-one were under consideration. The total amount allotted at that time for this purpose was $48,784,300".

This quotation correctly states the facts as of that date. In my book I refer to the accomplishments of PWA (664) and state that it has saved to consumers millions of dollars "through the lowering of rates by private utilities to meet the charges proposed by applicants for public power projects".

I say, "The rejection or withdrawal of some of the 200 applications that PWA did not approve was the result of this reduction of rates by the private companies to a point where there seemed no necessity or justification for a municipal plant".

Then on the next page I say, "These 'yardsticks' provided by both municipal and Federal enterprises are so valuable that they alone would warrant PWA's expenditures for power undertakings. The municipal projects have caused private utilities to adjust their rates downward in wide areas and the Federal projects have brought about rate adjustments over still larger expanses of territory". This quotation correctly states the facts.

Then in the last paragraph of this chapter of my book I say, "But more significant than the 'yardstick' quality of these Federal and municipal power projects is the fact that their development marks the beginning of an age of electrictiy for the United States—as age

which will make the mid-Victorian marvels of steam and gas seem primitive and crude. Once the tremendous locked-up reserve of electrical power in the streams and rivers and coal mines of the country has been adequately employed; once electricity as cheap as water, if not as free as air, is available to every householder; once equipment to utilize more generally the coming low-cost power has been perfected by the inventive genius of America, a magical and hitherto unimagined civilization will have dawned in the Western World". This paragraph correctly states the facts.

Q. Now, Mr. Ickes, what I have read from your book correctly states the Public Works Administration's national power policy, as applied to all loans and grants for power projects, does it not? A. The Public Works Administration's policy is incorporated in the passages that you have read.

There has been no change in that policy, as stated in my book, since August 26, 1935, when the final decree (665) was entered in this case, and no change in my purposes and aims as Federal Emergency Administrator in carrying out that policy.

The Public Works Administration has heretofore advanced Greenwood County, under the contract of December 8, 1934, $60,000, which I assume has been expended in the preliminary work in the construction of the project.

The suggestion of amending or changing the contract of December 8, 1934, so as to modify it in accordance with the contract of November 30, 1935, was made to me by my counsel. At the time that suggestion was made to me and as a part of the discussion between myself and my attorneys my attention was called to the record in this case. It was particularly called to the testimony of the witness Mr. Rose. The purpose in changing the contract was to bring ourselves within the ruling of the court so we could go ahead as speedily as we could with this project; this and others. Yes, I was concerned about the testimony of Mr. Rose. (I didn't think it represented the facts.)

I cannot say that I wanted an opportunity to answer the testimony of Mr. Rose. If that testimony had

not been in there at all in that precise form we still would have submitted the contract. This contract was called to my attention early in November, certainly within the first ten days or two weeks. No, my attention was not called to Mr. Rose's testimony when the matter was first called to my attention. I didn't read Mr. Rose's testimony until yesterday, and to the best of my recollection and belief I was not advised or told about it. No, I was not. Until yesterday I did not know what Mr. Rose had testified to, and had no information whatsoever about his testimony.

The bond resolution passed by Greenwood County in this case was prepared in Washington in consultation between counsel for Greenwood County and the attorneys for the Public Works Administration working it out together. The bond resolutions are in the record and will speak for themselves. I knew Greenwood County had entered into contracts for the sale of power, but I did (666) not know how much. (We did not approve rates. We are not interested in rates except insofar as our experts advised us that by charging those rates at which power could be sold they could liquidate their obligation to us. The rates set out in the bond resolution of the County are initial rates. There is no reservation of the right on our part to change those rates in the future. I don't know whether the contracts which Greenwood County made for the sale of power to be produced by the project were presented to anyone in the Public Works Administration or not. They were not presented to me personally. Our experts advised us that at that rate our loan would be liquidated. It was the same interest any banker would have in buying these bonds. We would not have entered into a contract if the rates had not shown a sufficient, prospective income, based on those rates to liquidate the loan. The rates as such were not approved by the PWA authorities. We knew that those rates were sufficient. If the rate were a lower rate applied to a larger sale of power which would have been sufficient in the aggregate to liquidate the obligation to the United States that would have been a satisfactory arrangement. On the other hand, if it had been a higher rate, applied to a lesser amount of power sold which would yield enough to liquidate the obligation of the United States that would have been a satisfactory ar-

rangement. We did not take into consideration the rates charged by the Duke Power Company in making this contract.)

RE-DIRECT EXAMINATION.

(667) Q. Mr. Ickes, under the PWA Act—under Title II of the National Industrial Recovery Act, two types of projects are provided: Federal and non-Federal, are they not? A. That's correct.

(Q. References were made to quotations given from your book with reference to the fixing of power rates, in connection—by the Federal Government. Do you care to classify the projects, with reference to the fixing of rates, in accordance with the classification I have just indicated? A. T.V.A. is a Federal project; Columbia River is a Federal project; Casper-Alcova is a Federal project; Grand Coulee is a Federal project. I don't recall what others were mentioned in the excerpts read by counsel.)

(Q. Did you intend, when reference was made to the fixing of power rates by the Federal Government, to refer to the fixing of rates of municipally-owned projects, to which loans and grants were made by the Public Works Administration? A. No.)

(Q. When you spoke,—I cannot quote your exact words—that charges were being made against the Administration that it was endeavoring to lower rates, did you refer to the Public Works Administration, or did you mean the National Administration, referring to the President—the party in office? A. I was referring to the National Administration and not the Public Works Administration.)

Q. In the case of the Greenwood County project, you would have made the loan and grant, regardless of your views as to whether the Duke Power Company's rates were, or were not, high?

Objection by plaintiffs on the grounds stated above and on the additional grounds that the *questions* calls for a conjectural conclusion by the witness and that the question is irrelevant and immaterial.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

(668) A. We would have made the loan and grant to Greenwood County, regardless of the rates, or our opinion of the rates, of the Duke Power Company, if Greenwood County had the legal authority to enter into the contract with us, and if Greenwood County could satisfy us that it could liquidate the loan that we made.

Q. Those were the considerations?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. They were.

RE-CROSS EXAMINATION.

As to whether the power policy of the Public Works Administration is a part of the National Power Policy I do not know. We have set up our own policy.

(669) At the conclusion of the reading of Mr. Ickes' testimony the book entitled "Back to Work" by Harold L. Ickes, was offered and received in evidence as Defendants' Exhibit 85. This exhibit is sent up with the record on appeal.

A copy of the loan and grant agreement of Nov. 30, 1935, between the Government and Greenwood County, offered and received in evidence as Defendants' Ex. 86, appears as an exhibit attached to Defendant's motion of Dec. 4, 1934.

G. R. BARKSDALE, a witness for the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I went before the Board of Review with a number of men from Greenwood County. The conference lasted about three days as I recall it. The first day, I believe, we met Mr. Hunt, Mr. Rau and Mr. Herring. There might have been some others. I did not go before the Board with this delegation on any other occasion than

this conference. (During the several days' discussion the question of reduction of rates was not mentioned.)

CROSS EXAMINATION.

This conference was, as I recall it, in July of 1934. That was after the Public Works Administration had already approved the loan and grant and was the only conference I ever attended.

RE-DIRECT EXAMINATION.

That hearing I attended was when the Government gave us the opportunity to reply to Duke in its appeal to the Board. They asked us to come there as to some figures.

RE-CROSS EXAMINATION.

The figures that we were asked to come there about were figures relating to the cost of the project. I was asked to be there as an engineer to support certain cost estimates, which I had made, covering the electric side of the project.

(670) F. W. CHAPMAN, a witness for the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I live in Greenwood, S. C., and have been there for about six years. I am Superintendent of the water and light plant at Greenwood. Prior to that time I was engaged in Camden and Laurens, S. C., in the same kind of work I am doing in Greenwood, and altogether in these three places have been engaged in this work for about fifteen years. I am familiar with the Buzzard Roost project in Greenwood County and fairly familiar with the Duke Power System having purchased power from them the six years I have been there.

(671) (In my opinion building the Buzzard Roost project would not materially affect the financial set-up of the Duke Power Company.)

F. W. CHAPMAN.

I have been in the partially completed steam plant of the Greenwood Cotton Mill. It is a 10-000 kilowatt steam and electric plant with an auxilairy ten thousand kilowatt unit. It is within several months of completion. I am not familiar with the steam plant at Clinton. (The only complaint we have to make as to the Duke Power Company's service is that their voltage regulation is not perfect for city operation. I took the matter up officially with a representative of the Company—Mr. Wiley of the Anderson district. The situation has not been corrected. The situation affects the consumer in that if the voltage is low the lights are dim and there isn't as much light for the money as the customer is entitled to. In a case of over-voltage the lights burn out too quickly and (672) the consumers have to purchase more bulbs. There is no way of holding the current at the correct voltage on a long-distance system without regulators. These regulators are very desirable.)

CROSS EXAMINATION.

(The only complaint I have is that the voltage regulation is not perfect for our service. This variation in voltage is usually over the week-end. I do not have our contract with the Duke Power Company but I have read it. I do not remember now whether there is a provision in the contract that the consumer will furnish the necessary devices for the voltage regulations. We plan to purchase regulators and can purchase them and correct this. They would cost between five and seven thousand dollars. As I understand the cause of the change in the voltage is that the mill load on week-ends with the Power Company is not as heavy as it is during the week and it becomes necessary for them to readjust the voltage they hold at the generators. The change in voltage is due to the load on the system. As to whether we have to have devices to steady that or to prevent these variations, ordinarily I presume that Duke would control that at their generating station.)

At the present time the town of Greenwood is purchasing power from the Duke Power Company and has been doing so ever since I have been at Greenwood. While I was at Laurens the town did not purchase from Duke Power Company but from the Reedy River Power Com-

party. Since Duke bought Reedy River, Laurens has purchased from Duke. (In my honest judgment I say if the Buzzard Roost plant was built I do not think that would materially affect the setup of the Duke Power Company. I understand that if the Buzzard Roost plant is constructed practically all of the contracts which they have for the sale of power are with present consumers of the Duke Power Company. I cannot say how much (673) annual revenue this plant would take away from the Duke Power Company except for our own corporation. The Town of Greenwood pays the Company between four and five thousand dollars a month at the present time—about $60,000.00 a year. It is true that they would lose that right away. $60,000.00 is to me personally a material sum of money. I have never seen the contract, but it is my information that the Town of Laurens would stop buying from the Duke Power Company and buy from Buzzard Roost. When I made my statement about the Buzzard Roost plant not materially affecting the setup of the Duke Power Company I made it with regard to Greenwood County. I didn't realize that Newberry and Laurens were included in that question and did not have that loss in mind.

Q. Well, if as a matter of fact, this plant would immediately take away something over a quarter of a million dollars a year from the Duke Power Company, from the revenues of that company, and leaving out of account any additional and subsequent damage or loss it would sustain, why you wouldn't say that that was a mere trifling amount of money, would you? A. I don't know the income of the Duke Power Company.

Q. Well, two hundred and fifty thousand dollars is a substantial amount of money, isn't it? A. Yes, sir.

Q. For anybody to lose? A. No answer.)

(674) CLARK FOREMAN, a witness for defendants, being first duly sworn, testified as follows:

I am Director of the Power Division of the Public Works Administration, and have been since August 1, 1935, when the division was created. The Power Division examines all applications for the generation, transmission and distribution of electricity and gas and makes

recommendations on these applications to the Administrator. The Power Division has three technical sections. One is the Finance Section, which examines the applications from the point of view of the security of the loan, if a loan is involved; the Engineering Division which examines the applications from the viewpoint of the engineering soundness of the proposed project; and the Legal Section, which examines the applications from the standpoint of their legality and also handles any litigation that may involve power projects.

That is the organization of the Division as it was from the beginning, as I organized it, and as it is today. During the time I have been Director something more than five hundred applications for gas and electric projects have come under my supervision and we have had a great deal of correspondence with respect to these projects. All letters that go out from the Public Works Administration are signed "For the Administrator". But those in the Power Division that go out over my signature are signed "Clark Foreman, Director of the Power Division, for the Administrator". There is an order in PWA or an order from the Administrator saying that all letters must have under the signature the words "For the Administrator". If they have that, it is tantamount to saying it is an official letter.

(675) Before our Division recommends applications for loans and grant for power projects to the Administrator, we must have assurance that the projects are legal, as certified by the Legal Section that they are legal, by the Engineering Section that they are engineeringly sound, and by the Financial Section that any loan which might be proposed would be financially secured.

If the project is a competitive project, that is to say, if it would be competitive with the existing private utility were it built, then we would have to assure ourselves that the rates of the project would be sufficiently low to secure business and sufficiently high to pay out the bonds which we would lend them, to secure the loan in other words, the principal and interest, amortization of the loan.

The COURT: In other words, if you built it by letting them have the money or the credit, whichever it is,

to build the thing with, why you would have some interest in being repaid? A. That is right.

Q. And you don't want to give the power away to these people that need the help, so cheaply that they wouldn't be able to pay the bonds back? A. Well, if revenue bonds we have to have that reasonable assurance, which the Act provides.

The COURT: Exactly.

Mr. W. S. O'B. ROBINSON, JR.: And, further that the rates have to be sufficiently low to get the business? A. I said low enough, low enough to get the market.

In the case of a loan secured by general obligation bonds we would have no interest in rates, either of the plant to be built or of the private company that might be operating there. Nor do we have any interest in rates in cases where a grant only is applied for and the municipality arranges for its loan from other sources. We do not give consideration to the rates of the proposed municipal plant or of the existing private utility for any other purpose than that of reasonable security.

Q. Tell us whether or not you give any consideration to this question of so-called social desirability of a project?

(676) Mr. ROBINSON, counsel for plaintiffs: We object on the ground that under Mr. Ickes' testimony this witness is disqualified to testify as to the policy, etc., of the Public Works Administration. Mr. Ickes testified that no one except himself and the President had any right to speak for the Public Works Administration.

The COURT: Well, there is certainly great force in your objection to the testimony; because Mr. Ickes did testify most forcefully that he and he alone, unless it were the President of the United States, could state his policy, and he repudiated Mr. Rose's testimony altogether. I think, however, the testimony is admissible.

A. Under ordinary circumstances we assume social desirability when the application comes in from the city. If a protest is made on an application and it is pointed

out that the social desirability is lacking, then we carefully study that protest, as we do all protests. But our invariable rule is that social desirability of a project is to be determined by the city itself, that is to say, the applicant.

Since I have been Director of the Power Division I have had occasion from time to time to discuss questions of policy and problems that arise in connection with power matters with the Administrator. I have not changed my policies or considerations that I give to municipal projects as Director of the Power Division.

Well, I am familiar with the terms of the contract that was executed on November 30, 1935, with Greenwood County. I am generally familiar with it, I have read it. It is typical of all our contracts in revenue bond cases. I was Director of the Power Division at that time.

(677) As to whether I am familiar with the form of the contract in effect between the Public Works Administration and the City of Sandusky, Ohio, which was introduced in evidence as Defendants' Exhibit 84, I am familair with it as a general form of contract in use by the Public Works Administration in cases involving general obligation bonds. Shortly after I became Director, we changed, I believe, all of the existing contracts that were on power cases which were not at that time under construction. The change was to the form used in the Greenwood County case or the Sandusky case.

Since I have been Director of the Power Division I have not, as far as I know, had any negotiations with the Duke Power Company with respect to the Greenwood County allotment. There may have been a protest filed but as far as I can remember there has not. At the present time there is no one else in the Public Works Administration that is charged with the handling of power applications.

The application of Sandusky, Ohio, in respect to which plaintiffs have introduced in evidence certain correspondence as their Exhibits 67, 68 and 69, came under the jurisdiction of the Power Division after I was appointed. Shortly after I was appointed Director of the Power Division letters came to my attention from the City of Sandusky, asking that action be taken immedi-

ately on their application. And I looked into the matter and found that it had been approved by the three existing divisions which were established which examined power projects before the creation of the Power Division and had recommended the allotment for this project. An allotment was made in December, I am not sure of the date, 1935, the culmination of the matter being the loan and grant agreement with the City of Sandusky. (Defendants' Exhibit 84.)

As to the application of the City of Tecumseh, Mich., referred to in Plaintiffs' Exhibit 60, I was advised by the State Director of Public Works Administration for the State of Michigan that the City of Tecumseh had entered into a five-year contract with the Power Company and was no longer interested in the (678) application, so the application was rejected.

The application of the City of Washington, Kan., in respect to which plaintiffs introduced in evidence through the witness Vennard a letter as their Exhibit 52, was rejected because the general obligation bonds of that city did not afford reasonable security.

Q. Now was that objection made before or after you became Director of the Power Division? A. I will have to look into this to find out. I can tell you.

Mr. ROBINSON, counsel for plaintiffs: I suppose the reasons for rejecting appear in the dockets. May I ask the witness about that?

The COURT: Yes.

Mr. ROBINSON: Do they appear in the dockets of these cases?

The WITNESS: That is right. And the applicants have been so notified.

Mr. ROBINSON: That being so, we object to this evidence as not being proper, because it is a matter of record.

The COURT: Have you got them here, Mr. Witness?

The WITNESS: Your Honor, I am not sure that that docket was brought down here. Washington, Kan., I found was one that was *was* rejected before I was Director of the Power Division and I am not sure the lawyers brought it down.

Mr. ROBINSON: I don't want unnecessarily to en-

cumber the record; but this gentleman is referring to an application as having been refused because of certain facts and we don't know when it was refused, whether it was during his regime or whether he is the one that refused it.

The WITNESS: I have just a list here, I admit that is all I have, just this.

(679) The COURT: I don't think he has gone too far; I will not strike it out. Was there an answer to that last question?

The WITNESS: There was no answer because I don't know. I have since looked it up and I found that it was rejected before I was Director of the Power Division. You see, I have a list as of January 1, 1936, which gives me the status of the projects at that time.

The application of Plainview, Tex., about which Col. Carter testified, was withdrawn. The present status of the application of the City of Dowagiac is that there is an allotment pending and Defendants' Exhibit 83 is the form of agreement in existence between the Public Works Administration and the City of Dowagiac. The application of the City of Rector, Ark., was withdrawn by the City. As to the application of the City of Kennett, Mo., after that decision out there we sent them a new agreement, but according to my records the City has not signed it. As to the City of Petersburg, Ill., referred to by Mr. Vennard, I have only the records with me which show that the allotment at one time was made, but it doesn't exist on the latest list which I have, which I take to mean it has either been rejected or withdrawn in the meantime, but I don't know.

An allotment was made to the City of Concordia, Kan., but was later rescinded after suit was instituted by the local power company which terminated unfavorably for the City.

As to the application of the City of Stigler, Okla. I only have a record that it has been withdrawn.

Middleboro, Ky., had originally an allotment for a generating plant and a distribution system. As a result of the local election recently held, the City has decided to buy its electricity from the Tennessee Valley Au-

(680) thority and not to build its own generating plant,

and therefore has amended its application to us and the allotment has been changed accordingly.

As to the City of San Angelo, Tex., I only have a record that an application was in before the Public Works Administration at one time, and the application has now been rejected or withdrawn. That was done prior to the creation of the Power Division.

As to the application of the City of Marlin, Texas, the records show that this application is considered as withdrawn upon the official request of the City that any further action on it be suspended.

As to the application of Mount Dora, Fla., I will state that this application was disapproved by the Finance Board on the ground that the bonds offered did not constitute reasonable security. It was also disapproved by the Engineering Division and after learning of these disapprovals the City of Mount Dora entered into a five-year contract with a local utility company and the application was suspended.

As to the application of Morenci, Mich., this application was either rejected or withdrawn some time previous to January 1st, 1936, and I think before the Power Division was created.

As of January 1, 1937, all the non-Federal projects of PWA amounted to 9389, or in money, $1,480,612,543.00. Of these non-Federal projects 282 were power projects. Of these power projects we have estimated 92 involved competition with existing private companies, using competition in the broadest sense and meaning alleged competition. The total amount of money involved in these 92 projects is $27,339,947.00. This figure does not include allotments for the large hydro-electric projects such as Santee-Cooper and the Nebraska project. It includes projects such as the one here under discussion and other municipal projects where there would be a question of replacement or actual competition with the existing private utility. We do not consider the Nebraska and Santee-Cooper projects as competitive in the (681) same sense, there being no assurance that there is going to be any actual competition on those projects. Also most of those projects include other factors than power production such as irrigation, flood control and navigation features. There are seven of those large hydro-electric projects and the total amount of money allotted to them amounts to $54,025,000.00.

CLARK FOREMAN.

Mr. SHER: May it please the court, with respect to the testimony of this witness as to the projects that the plaintiffs introduced, we offer this without waiving our rights as to the admissibility of the evidence.

The COURT: All right. Yes, sir, you contend we should not have gone into these other projects at all, but in that the Court overruled you and went into it you say this evidence is admissible in reply, without waiving anything as to your original position that it should not have been introduced. The Court understands that.

CROSS EXAMINATION.

I became Director of the Power Division on August 1, 1935. As to the status of certain projects including the Plainview, Texas, project, it was our information that this application had been withdrawn as the result of an agreement made between the existing utility and the City. On the basis of that information we withdrew it from our records. I do not know that back of the withdrawal of the city was the execution of a contract between the existing utility and the city at rates which were as low as those in the proposed application. I do not know that yet. I am not sufficiently informed about that project. I only know we were informed that the Power Company granted some rate reductions. What those were I have never been informed.

I heard yesterday in the testimony that in the case of the application of the City of Dowagiac, Mich., the Power Company first reduced its rates to those stipulated in the application for the PWA plant, and that thereafter the rate of the PWA plant was lowered. I looked in the records and I think there is a letter saying the rates of the power company were so lowered. However, there was no action on the application, and therefore they changed nothing so far as we were concerned.

Q. That is when the power company lowered their rates there was no action at that time? A. The city did not withdraw its application.

Q. And there was no action on the application either? A. So far as we are concerned whatever the power company did meant nothing, so long as the city kept its application before us.

Q. The fact is at the time when you found from the inspection of the files that the power company had put in the lowered rates, no action was at that time taken by PWA on the application? A. No action was taken.

It was some time later that the allotment was made. When I came in as Director of the Power Division there was some question about the legality of the loan and as soon as that was cleared up the allotment was made. I said so far as I can remember I had no negotiations with the Duke Power Company in connection with the Greenwood project. I certainly had no correspondence with them as to rates. I am aware that the Greenwood Project was in litigation a considerable time before I became Director of the Power Division.

The Sandusky, Ohio, project is one involving general obligation bonds.

When the question of revenue bonds was involved, in passing upon an application we had to be sure that (682) there was sufficient revenue coming in. I had to be assured that the loan would be reasonably secured as provided by the statute.

We have applications before us in which the applicant presents contracts in advance for ninety per cent in that town. Well, now, it didn't make any difference, as they had the contracts, whether the rates were lower or not. If they have the contracts and if the people have to pay higher rates I don't care, just so the loan is secure.

As to whether in those cases that I last mentioned we ascertained that the proposed plant had signed up enough of the customers of the existing utility to insure its competitive success, I say that we don't look into the present trading situation. As long as they are customers we do not care whether they are buying electricity now or not.

As to whether in case of duplicate plants we understand and assume where contracts for customers are presented that they are customers not served by an existing utility, I would like to refer you to the fact that in the existing application for Greenwood County a great many mills in that County who are not now trading with the Duke Power Company have signed an agreement to buy electricity from the County.

In answer to your question as to whether in our

general practice we assume, or at least are not ignorant of whether customers signed up for a proposed duplicate utility are customers of the existing utility, all I can answer again is that we have to be assured the loan is reasonably secure and the security of the loan must depend on the individual situation. I would not think that the normal success of a duplicate competing plant in a municipality depended absolutely upon its rates. (683) Usually I should say it did.

If the proposed municipal utility financed by PWA, adopts lower rates than the existing utility, the usual thing would be that the one which had the lower rate would get the majority of the business. I do not know that if a plant built by PWA funds puts in a lower rate, the existing utility will have to meet that rate or go out of business. As to whether the private utility might continue to compete at a higher rate we have been assured in a great many cases that no matter whether the municipality puts in a municipal plant or not a great many customers will stay with the private utility regardless of the rates. No, I would not say that it is my common experience that a great many customers of an existing privately owned utility are determined to stay with the company regardless of how high its rates are. But many times we have received letters from the power companies saying a municipal plant could not pay out because regardless of the rate the customers would stay with the private power company.

Where a loan is involved the Financial Section considers the financial soundness of the application for a project. If the project can finance its loan outside of the Public Works Administration we encourage that.

I have answered the question as to whether social desirability is a separate thing to be considered and determined. We assume when a city makes its application, that covers the social desirability, but if a protest is made by a power company or others that the application is lacking in social desirability we examine that protest and in some cases even refer it to the city for their information, if we think something has escaped their attention which has been brought to us by protest.

In all cases where we are making a loan we examine engineering soundness, financial soundness and legal (684) soundness. In all cases we assume social desir-

ability is involved. We assume its existence if the city says it exists, and outside of that assumption we never give it any consideration unless a protest is made, in which case we refer it to the city. Yes, we consider social desirability if it is raised in a protest.

Q. On May 19, 1936, Mr. Foreman, in the case of Texas Utilities Company and others in the Supreme Court of the District of Columbia, Secretary Ickes was asked these two questions and made these two answers, page 1472 of the transcript:

Q. "Mr. Secretary, dealing specifically with an application for a duplicate and competing municipal power project, what was the element of social desirability which governed the action and decision of PWA? A. Well, there might be several. It might put the municipality in the position of being able to supply current to its citizens at a lower rate; the city gives employment in construction and in operating the plant and it might have the effect of removing from the hand of the municipality the heavy and in some cases corrupt hand of a public utility."

Q. "Were those all criteria which PWA considered in determining the social desirability of an application for a loan and grant for competing municipal plant? A. They were proper to be considered. I think in a general way they were considered."

Mr. W. D. ROBINSON, JR.: I would like to interrupt before you finish.

Mr. JACKSON: Let me finish.

Mr. D. W. ROBINSON, JR.: I don't believe it is competent to get Mr. Ickes' testimony in this way, and of course if the question is read it is in. We of the county want to object to this as hearsay.

The COURT: You mean in light of the present situation he can't cross examine him about his superior's statement?

Mr. D. W. ROBINSON, JR.: I don't believe he can, your Honor.

The COURT: I am not saying he can.

Mr. D. W. ROBINSON, JR.: His superior has been on the stand in this case and has testified. Now there are

probably portions of Mr. Ickes' testimony in the Alabama which the plaintiffs might consider more favorable to their view than the testimony here. There are probably other portions which we might think more favorable to our viewpoint. I am not very familiar with his testimony there but I don't believe that Mr. Ickes' testimony taken in the Alabama case can be introduced in this case by asking this witness whether he agrees or disagrees with it or some other formal question after reading Mr. Ickes' testimony. It is hearsay. Mr. Ickes has been on the stand and had an opportunity to be examined fully in this case.

Mr. JACKSON: I don't understand when a witness is confronted with something on cross examination that it becomes evidence expressed to the extent that he accepted, and therefore I don't think that the objection Mr. Robinson has made—

The COURT: Yes, sir, but let's see if he isn't right to this extent. Your question was didn't Mr. Ickes testify so and so and then you proceeded to give both question and answer as it appeared in that case, don't you see, so that you were getting to the Court not only the question that the attorney engaged in the trial of that case up there asked Mr. Ickes, but getting his response to the question in here bracketed under your question, "Didn't he testify so and so".

Mr. JACKSON: I expect I am in error somewhere, but I don't catch it.

The COURT: Isn't this right? Mr. Robinson says this. He says you are asking this witness to compare his testimony with Mr. Ickes', his superior's testimony in another case up in Washington, and in order to do that you asked him if Mr. Ickes testified as follows. Then you read the question counsel asked him up there and before he answers, before anybody else answers, you read Mr. Ickes' response to it, thereby getting Mr. Ickes' response out here today, whereas if he were present in Washington to object he would just as soon as the question was asked and before Mr. Ickes answered. He is correct on that.

Mr. JACKSON: As I understand it if I had a written statement that had never been given in court under oath by the superior of this witness I could show it to him and ask my question not to prove it, but—

The COURT: You asked him how he reconciled his present testimony with that.

Mr. JACKSON: What I intended to ask was whether or not he challenged the truthfulness of what Mr. Ickes said in that testimony.

The COURT: I don't see much difference between challenging the truth and reconciling.

Mr. JACKSON: If I understand what I am doing, your Honor, I am not offering Mr. Ickes' testimony at all. As I see if I could read all this and it wouldn't amount to anything except it would have unfortunately wasted the time of the Court, unless this same witness said he agreed with it and its force or effect is because this witness says, "I agree with it", and to that extent he makes it his testimony, and to the extent he makes it his testimony it is admissible in this case. The point is the only way I can show the statements were made is by offering that part of the transcript in evidence.

The COURT: Well, if this witness doesn't know whether he testified to that or not he can say so.

Mr. SHER: Doesn't he have to first show that Mr. Ickes did make those statements?

Mr. JACKSON: I assumed I could identify this part of the transcript for identification and it being proved that it was a true part of the transcript I could use any part of it and in view of the fact that the counsel in this case, including Mr. John W. Scott, Mr. Dempsey and Mr. Sher were counsel in that case, I don't think there would be any question of authenticity.

The COURT: Well, I am going to let you ask him that question and if they want to ask anything more they may have the right to do it.

Mr. SCOTT: May I make a suggestion? It seems to me the process is in the nature of an attempt to read into this record the testimony of this other witness. It isn't impeachment of this witness. There is no foundation laid.

The COURT: Of course it is not impeachment.

Mr. SCOTT: It seems to me what he should be permitted to do and only be permitted to do is read the substance of this answer possibly.

The COURT: Go ahead with what you are doing. I am not going to let either side get out of bounds on that proposition. Go ahead.

Q. Do you agree with Mr. Ickes' testimony as to the elements of social desirability which were considered by PWA in passing on competing municipal plants?

Mr. SHER: We object to the form of the question. It is improper cross examination.

The COURT: I will have to overrule your objection since I have had a minute to think about it. It is so intimately connected with direct duties of this witness to begin with, it is so intimately connected with other testimony in the case that it is perfectly proper to avail yourselves of that record in order to cross examine this witness intelligently, and I think it is all right and any use of that document that is so intimately connected with previous testimony in this case will be permitted. Your objection is overruled. Go ahead.

A. I would not like to attempt to agree or disagree with the Administrator on the power policies. I can speak only for the Power Division and the standards we use are those I have described.

In what I have said I have spoken only for the power division. I do not claim to have the right to write the policies of the Public Works Administration. I do not (685) claim any final authority upon the approval of loans and grants for competing municipal electric projects. I claim only the authority to establish standards or criteria. The criteria I use in the Power Division are those I set up. I have no control over those, in addition thereto, which may be used by the Administrator.

Plaintiffs asked to have marked as Plaintiffs' Exhibit 74 for identification a letter dated October 22, 1935, addressed to John M. Wright and signed "Clark Foreman, Director of Power Division for the Administrator", which was produced by counsel for the defendant, H. L. Ickes.

The WITNESS: Plaintiffs' Exhibit 74 for identification is a copy of a letter I wrote and I presume it was mailed.

RE-DIRECT EXAMINATION.

The applications of the City of Marlin, Texas, and of Tecumseh, Mich., were in suspense when I became Director of the Power Division and they were disposed of after. Before this letter of October 22, 1935, marked for identification Plaintiffs' Exhibit 74, was written, we had received an application from the City of Eldon, Iowa. After the application came in we received a protest from the Iowa Power Company in which the statement was made that the rates proposed in this town were, as I remember it, highest of any town of that size in the State of Iowa. The Power Company also made other allegations as to the engineering soundness of the project and other things. It mentioned particularly the matter of rates and said that the city would be much better off if they bought power from the Power Company than if they built for themselves. I thought that might have escaped the city's attention and we passed the information on to the city for whatever action they wanted to take. That was the latter part of October, 1935.

(686) The letter you show me, marked for identification Defendants' Exhibit 87, is a letter I received from the City Clerk of Eldon, Iowa, in reply to my letter of October 22, 1935.

The defendants then offered in evidence this letter from the City Clerk of Eldon, Iowa, to Mr. Clark Foreman, dated October 24, 1935, as Defendants' Exhibit 87, to show the course of the application. The letter which was admitted in evidence is as follows:

CITY OF ELDON

Wapello County, Iowa.

October 24, 1935.

Received 10/28/35.
Power Division

Mr. Clark Foreman,
Director, Power Division, PWA,
Washington, D. C.

Re: Docket Iowa—1345
Eldon Light Plant

CLARK FOREMAN.

My dear Sir:

In reply to your letter of October 22, last evening we received a report from our engineers (Young & Stanley of Muscatine, Iowa) in which they presented their estimates of the size and costs of the equipment necessary. This was made after a survey of our demand load, consumption, etc., over a period of time.

The engineers feel the ideal set-up for us is three 150 HP engines, which would give 300 HY "dependable" at all times, and at the same time be the most economical in operation, as our load could be carried with one engine during about 12 hours of the 24.

However, they feel that bids should be asked on three bases, namely: (1) two 300 HP (2) one 225 and one 300 HP and (3) three 150 HP.

(687) Under this arrangement a new building would be erected, at a cost of about $5,000, which could be done and still keep within the limits of our proposed bond issue. It is extremely doubtful, according to the estimates, if sufficient money can be made available for either set-up #1 or #2.

I assume your estimate of the cost of generating, including the debt service, which is set at 2.45¢ per KWH, is based on the operation of the two 300 HP engines and also on the cost price, which our engineers estimate to be about $5,000 above the available funds. Their estimate based on three 150 HP and liquidating the debt in 12 years is 1.8¢ per KWH, which is .5¢ less than we are now paying the private utility.

In regard to the reduction in rates suggested by your letter, the Council has made some estimates in this regard, and I can take the liberty of quoting the present rates for various classes of service and also the tentative rates.

In this particular, many friends of the municipal plant idea are opposed to any rate reductions until such time as the plant is fairly established.

Present Rate		Proposed Rate	
Residence		Residence	
First 25 KWH.....	12¢	First 35 KWH	10¢
Next 25 KWH	10¢	Next 35 KWH	08¢
Next 50 KWH	08¢	Next 30 KWH	06¢
Next 100 KWH	06¢	Over 100 KWH	04¢
Over 200 KWH	04¢		

Optional Residence		Optional Residence	
First 50 KWH	08¢	First 50 KWH	08¢
Over 50 KWH	04¢	Next 50 KWH	04¢
		Over 100 KWH	02¢

(688) Optional Business		Optional Business	
First 50 KWH	08¢	First 50 KWH	08¢
Next 50 KWH	06¢	Next 50 KWH	06¢
Over 100 KWH	04¢	Next 50 KWH	04¢
		Over 150 KWH	02¢

Power		Power	
First 25 KWH	08¢	First 25 KWH	08¢
Over 25 KWH	04¢	Next 75 KWH	04¢
		Over 100 KWH	02¢

We feel this proposed reduction will benefit the extremely small user and tend to stimulate the use of major appliances by those on our Optional Resident rate, without material injury to our revenues.

Very truly yours,

(Signed) JOHN M. WRIGHT,
City Clerk.

914943 Oct. 26, '35.

The WITNESS: After the receipt of this letter we accepted completely the City's desire in the matter and made the allotment, entering into a loan and grant agreement with the City of Eldon, Iowa.

The defendants offered and the Court admitted in evidence the following exhibits, copies of which are hereto attached.

Defendants' Exhibit 88, being resolution of the Greenwood County Finance Board of November 30, 1935.

Defendants' Exhibit 89, being resolution of the Greenwood County Finance Board of December 2, 1935.

Defendants' Exhibit 90, being a statement of the annual power sales of the Duke Power Company and the annual gross revenue therefrom.

Defendants' Exhibit 91, being a statement of the kilowatt hours generated annually by the Duke Power Company.

(689) Defendants introduced the testimony of Emmett I. Davis taken before Judge Watkins in Spartanburg on December 12, 1935, as follows:

EMMETT I. DAVIS, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

I am a member and Secretary of The Finance Board for Greenwood County, and have been closely associated with this project from its beginning to date.

(During the summer of 1933, Mr. D. T. Duncan suggested to the Finance Board for Greenwood County that the County make application to Federal Government for loan and grant with which to build a County Hydro-Electric Plant on Saluda River. Finance Board asked Mr. Duncan to make up an application, which application was unanimously approved by Finance Board for Greenwood County and filed with the State Office of the Public Works Administration in Columbia, S. C., November 16, 1933. Neither the Public Works Administration of the Federal Government nor any other branch or representative of Federal Government, so far as I know, solicited or suggested the filing of this application. Greenwood County has taken the initiative in filing application, pressing Public Works Administration for an allotment and in litigation involving the (690) case.) The Revenue income table set up in original application was based on a rate schedule made up by D. T. Duncan and are substantially the same rates as were later approved and incorporated in Bond Resolutions. The Finance Board fully understands that it has the authority to change rate schedules either up or down and that rates charged must be sufficient to operate plant and to meet bonded obligations. The Finance Board is of the opinion that present rate set up is sufficient to liquidate loan.

Greenwood County has not heretofore and does not intend to confine its efforts to sell Power to Duke Power

Company customers alone. Greenwood County hopes to sell the major part of its primary current output to municipalities, rural sections and small industries in Greenwood, Newberry and Laurens counties and surplus primary and secondary to large industrial users. The undeveloped rural load in the three counties plus the developed industrial load in Greenwood County, not now sold by Duke Power Company, is sufficient to liquidate loan at proposed rates. The principal motive of the Finance Board for Greenwood County in fostering this project is to make rural electrification possible at rates the rural populace can pay and to supply municipal owned distribution systems current at rates substantially lower than they are now paying. (I know of no instance either in correspondence or in interviews where the Public Works Administration or any of its employees or agents have said or intimated that the direct or implied object of this loan and grant was or is for the purpose of forcing down Duke Power Company rates.)

CROSS EXAMINATION.

The resolution of November 30th, 1935, is an authorization to the proper officers of the County to execute the contract of November 30th, 1935. The resolution of December 2, 1935, re-adopts practically the same rates (691) for the sale of power which were included in the original bond resolution. They are substantially the same rates at which the County has made contracts for the sale of power from this project. I think some of the sales probably don't go into detail. The record in this case shows the amount of power which the County has already contracted to sell, and to whom it has sold it and the rates, etc. None of those contracts for the sale of power have been changed.

(692) EMMETT I. DAVIS further testified on the retrial as follows:

DIRECT EXAMINATION.

I am Secretary of the Finance Board of Greenwood County and as such have had charge of the cor-

respondence of the Board with the Public Works Administration in connection with the Buzzard Roost project. (I have received at no time since the application has been filed or prior thereto any letter from anyone connected with the Public Works Administration with regard to the rates of the Duke Power Company. I have not received at any time from anyone connected with the Public Works Administration a suggestion that Greenwood County withdraw its application in exchange for the lowering of rates in the territory served by the Duke Power Company.)

I have been to Washington in connection with this application, allotment and contract on several occasions. I went up there between the time the application was filed in November, 1933, and the allotment was made on June 19, 1934. I was there just after the Duke Power Company's protest. I think about the latter part of July, 1934. Mr. Barksdale, Mr. Duncan, Senator Nicholson, Mr. Sweeney and myself made up the party. We conferred first with Colonel Hunt and were referred by him to Mr. Rau and we conferred with Mr. Rau and Mr. Herring for approximately two days. This was in the latter part of July during the time the Duke Power Company's protest was being considered. (I do not recall a single instance in which either Colonel Hunt, Mr. Rau or Mr. Herring referred to the rates of the Duke Power Company. At no time did any of these gentlemen suggest that the County withdraw its application in exchange for a lowering of the Duke rates.)

Mr. Duncan, the County engineer, prepared the rates for the Greenwood County project. The general (693) rate was set up in the original application and filed November 16, 1933 in Columbia. The rate we still have in effect is the same rate that was in the original application before it was ever approved. The rate was broken down and detailed schedules set up later but the average rate is practically the same. (No one connected with the Public Works Administration, either by letter or in oral conversation, suggested a change in those rates.)

In our interview with Mr. Rau we were called for the purpose of substantiating our estimates on the project. He expressed some doubt, as I recall it, as to whether or not the rate was quite sufficient to liquidate the project, but after two days'

conference he was satisfied. He did not make a suggestion as to the rates, but just expressed the general statement that he had some doubt about the rates being sufficiently high to liquidate. Our original plan was to sell in one County and then broadened later into a three County plan. We have negotiated with the City Councils of Newberry and Laurens, our contracts for power being with those cities, not with the counties. Those counties have not created any county agencies specifically for this purpose, as we have.

(The principal motive of the County in making this application was to be able to supply electricity to the municipality and the rural areas at a cheaper rate than we thought we could otherwise do.) The plant will generally serve municipalities, rural areas and small industries. We have some secondary contracts with a mill, but we won't have generating capacity to take on a great many more industries of that size. We have one contract with a textile mill, that is Mr. Abney's mill, the Grendel. That is for secondary power. It is our thought that with the increase in consumption of power it will be only a comparatively short time before the municipalities and rural areas will begin to absorb the (694) output of the plant. We do not have enough power to sell any appreciable amount of textile industries.

(Assuming that our plant is built and we sell to the customers that we have tentative contracts with now, that would not have any effect, as I understand the setup, upon Duke's high tension lines in our areas except probably the dismantling of some sub-stations. I should think that such sub-stations or transformers could be transferred and used at another place.)

CROSS EXAMINATION.

The rates we set up in the original application with the exception of the detail of later breaking them down are in substance the same rates which have been set forth in the two rate resolutions of the County and are the rates at which the County now proposes to sell the power if the plant should be constructed. There has been no change. The Public Works Administration has never made any objection to those rates so far as

I know except the suggestion I mentioned a little bit ago when in July, 1934, after the Duke Power Company made its protest, they called on us to substantiate our estimate of the cost of construction in the light of the protest and asked us to reaffirm our estimate of the cost.

When we first went to see Mr. Rau, at the beginning of the interview he expressed some doubt as to whether we could operate at the rate set out in our application in view of the showing as to possible cost, but after going into it he did not raise that question any further. He evidently was satisfied, so far as I could tell, that the County could operate at the rate set forth in its original application.

The Exhibit which has been offered in evidence as Plaintiffs' Exhibit 18, sets forth the customers with whom the Buzzard Roost plant has heretofore made contracts for the sale of its output and a list of prospec-
(695) tive customers in the Buzzard Roost area to whom the plant might be able to sell the remainder of its output. Among the list of customers we have "Rural Electrification—500,000 kilowatt hours; and among the prospective customers we have "Rural Electric customers—1,000,000 kilowatt hours". We estimated that the customers with whom we have made contracts would take 15,200,000 kilowatt hours a year, not including the secondary. All of these customers included in the total of 15,200,000, except the 500,000 kilowatt hours for rural electrification, are now customers of the Duke Power Company.

Our engineers have agreed on an estimate that the total output of this plant in primary power is about 30,000,000 kilowatt hours. The contracts we have are for approximately one-half the output. The estimate at that time was that of the other half, or approximately 15,000,000 kilowatt hours, one million kilowatt hours might be sold to rural electric customers, and the other prospective customers are those given in that list that was set up in the application appearing on page 341 of the record in the Supreme Court.

Re-Direct Examination.

Since the time this statement, appearing as Plaintiff's Exhibit 18, was made upon September 13, 1934,

we have some prospective contracts with one of Mr. Abney's mills, the Grendel, for the sale of primary power. My estimate of what we would sell him annually for that mill would be a guess, but it would be a considerable quantity. At the present time that mill is not a Duke Power Company customer, it having its own plant and steam power production.

RE-CROSS EXAMINATION.

The original contract with the Grendel mills is for secondary power to the extent of approximately three million kilowatt hours. I don't think we have actually made any contract for the primary power.

RE-DIRECT EXAMINATION.

(696) These negotiations have been since these lists were compiled.

Defendants introduced testimony of D. T. Duncan taken before Judge Watkins at the hearing in Spartanburg on December 12, 1935, which testimony was introduced as a deposition, pursuant to the stipulation of February 18, 1937, set forth at the beginning of this narrative, and is as follows:

D. T. DUNCAN, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

As Chief Engineer for Greenwood County and its Finance Board in connection with the Buzzard Roost project, I was asked by the Board, after the execution of the superseding agreement of November 30, 1935, to review the rates which the Board proposes to charge for power from the Buzzard Roost project in the light of the new contract.

The matter was taken up by me with the engineering staff and I have reached the conclusion that the rates attached to the County Resolution of December 2, 1935, are proper rates to be fixed by the Finance Board, at the present time, on this project.

These rates are substantially the same rates which

were fixed by our engineering staff at the time of the original application of the Public Works Administration for a loan and grant, which was made about the 16th day of November, 1933, a copy of which was introduced in evidence in this case as Defendants' Exhibit No. 49.

We still believe that those rates are substantially correct, and that these rates will yield a sufficient income to take care of the operating costs of the project and to amortize the 4% bonds in 25 years, as provided in the superseding loan and grant agreement.

In the hearing before Mr. Walters I submitted as defendants' Exhibit No. 25 (Record, page 410) my estimate of the gross income and the net amount available for paying the interest and the principal on the loan. That statement indicates a very substantial surplus, and (697) indicates that lower rates than those which were recommended might be adopted by the County. However, the engineering staff felt that it was best to be conservative, and set the rates at the present time at the schedule set out in the minutes of the Finance Board of December 2, 1935. If all of the power is sold it will probably be possible to reduce the rates, if the Board sees fit to do so.

(My understanding of the law is that under the Revenue Bond Act of 1933, Section 21 (28 Stat. 418) that the County may adjust the rates so as to provide ample funds for paying the principal and interest on the debt.)

(The original rates fixed in the application were fixed by me and by my engineering staff, without any advices or suggestions from any one connected with the Public Works Administration.)

In going over these matters again, at the request of the Finance Board, our engineering staff has acted independently of the Public Works Administration, and recommended these figures to the Board without consultation with the Public Works Administration engineering staff.

(I began work on the Buzzard Roost project about the 1st day of Aug., 1933, perfected the application,

and filed it with the Public Works Administration for the Board on Nov. 16, 1933. No one connected with the Public Works Administration or any other branch of the Federal Government solicited this application from me, or as far as I know from any member of the Board. Greenwood County filed the application and has pressed it with the Public Works Administration as vigorously as possible. The application was filed on November 16, 1933, and the allotment was finally made in June, 1934, in the sum of $2,757,000.00, as shown by the defendants' Exhibit No. 50 (Record, page 463). Duke Power Company entered a protest, the Board reconsid-
(698) ered the allotment and after hearing in July, 1934, increased the allotment due to a subsequent increase in mileage of the main transmission lines by $85,000.00, and reaffirmed the original allotment, as shown by defendants' Exhibit No. 52 (Record, pages 64-65). At all times the County has been the body pressing for this allotment. It has not been solicited in any fashion, as far as I know, by the Public Works Administration.)

(We are not confining ourselves to the customers of the Duke Power Company but expect to sell a large amount of power to rural customers, the Greenwood Cotton Mill, the Matthews Cotton Mill, the Ninety Six Cotton Mill, and the Ware Shoals Manufacturing Company, none of which buy any power from the Duke Power Company except the Matthews Cotton Mill which purchases approximately 10% or 15% of its power requirements from the Duke Power Company, the remainder being produced by its private steam engine. Two of the largest customers which the County has contracts with at present are not customers of Duke, namely: The Panola Cotton Mill and the Grendel Cotton Mill. Greenwood County anticipates the attraction of new industries to the County by virtue of the lower rates.)

(699) MR. D. T. DUNCAN testified further on the rehearing as follows:

DIRECT EXAMINATION.

In my previous testimony I have gone into my qualifications. I am the engineer in charge of the Greenwood

County Hydro-electric plant at Buzzard Roost, beginning that work in the fall of 1933. We filed application with the Public Works Administration in the fall of 1933. The first allotment was made June 19, 1934, I think. There was a protest by Duke Power Company which came just after the loan had been approved.

Our first contract was made on December 8, 1934, and the supervening contract Nov. 30, 1935, which is the contract now in effect. Between the time of our application and the time of the allotment in June, 1934, I went quite often to Washington to confer with the Public Works Administration in regard to the Greenwood County application. I do not recall the names of all the people I conferred with there, but I conferred with a great number, including Mr. Wingfield in the Financial Division, Colonel Waite and his aid Colonel Clark.

(In designing the average rates which were put into the original application, there were two considerations I had in mind, mainly I had to have a rate that (700) would retire the loan in a reasonable length of time; and the next was that we had to have a rate under which we could sell power. In getting at that rate one of the main considerations was whether we could undersell the private steam plants in Greenwood County. There are about half a dozen or more mills there that have their own steam plants and the idea was that if we could sell power to them cheaper than they could generate it in their own plants they would buy it. Our big customer in our original application was the Greenwood Cotton Mills. They use about twenty-seven or thirty million kilowatts a year under operating conditions of eighty hours a week although using more than that now because they are running all day. I have been informed that they buy about a million kilowatts from Duke at one of their mills at which their consumption slightly exceeds the output of their steam engine. In other words they use twenty-seven million kilowatts annually and buy one million from Duke.)

We later changed our plans so as to provide for a three County schedule and took on municipalities. That was to have small consumers to give a better diversification. Cotton mills sometimes close down. We signed up a number of our contracts on exactly the flat rate that we fixed in November, 1933, but as to others we

thought it would be better to give customers who use the most power the advantage of the rate with a demand in it. I should say about half of our contracts were signed up under the new rate which averages out just about the same as the original rate.

(In my conversation in Washington before the allotment was made no one connected with any of the divisions of the Public Works Administration discussed with me the Duke Power Company's rates nor did they make any suggestions with regard to our rates.) I was present in July, 1934, with Mr. Barksdale and Mr. Emmett Davis in that conversation with Mr. Herring, Mr. Rau (701) and Mr. Hunt. My recollection is that Mr. Rau thought we should raise our rates a little so that we would have a better margin of liquidation. We did not accept that suggestion.

(My opinion, as to the effect of the development of the Buzzard Roost plant upon the Duke Power Company, is that the Duke Power Company is so large and the Buzzard Roost plant so small, if it had any effect at all it would be infinitely small.)

CROSS EXAMINATION.

The rates we originally set up and incorporated in our application are approximately the same in substance and effect as the rates which we reincorporated in the two rate resolutions of the County and are the same rates at which the County now proposes to operate the plant. When we originally prepared those rates we knew we would have to fix a rate which would enable us to undersell the private steam plants with which our plant would have to compete. We knew that our rates would have to be below the Duke Power Company with which we would have to compete. If our rates had not been below the rates of the private steam plants and of the Duke Power Company we would have no chance to get the business with the exception of the rural lines we propose to build. We, of course, would get those. They weren't being served at the time and any rate we had, if we were instrumental in building the lines we would have those customers. The rural customers were being served only to the extent that the Town of Greenwood had a few rural lines extending

out from town which the customers had built for themselves. Such customers were being served with Duke power coming through the Town of Greenwood. Also I would like to add to that that there were a number of mills that weren't using electricity for their drive and they were proposing to change over into modern electric drive.

I heard the questions that you asked Mr. Davis about the list of customers set forth in the application (702) with whom contracts have been made for the sale of power and the proposed customers and my testimony, if you asked me the same question, would, I think, be the same as Mr. Davis'.

I got to see Colonel Waite, Deputy Administrator, one time by a lot of maneuvering. I am not familiar with his letter to State Engineers that has been introduced in evidence here.

Q: Mr. Duncan, you stated in your opinion you thought the injury which the Duke Power Company would sustain by reason of this plant, would be small or negligible or some such term. I take it you mean by that, that when you consider the business which the Duke Power Company would lose to the Buzzard Roost plant and compare that with the total amount of business which the Duke Power Company has, it would be relatively small? A. Yes, having in mind also the increase is sixteen times as much as the total output of this plant, and by the time you had it built you wouldn't find you lost any power at all.

Q. And if we lost something over a quarter of a million dollars' worth of business there, that would be small compared to the total business? A. It wouldn't actually be lost because you would have this other increased load taking its place.

Q. If, as a matter of fact, the Duke Power Company had sufficient capacity to take care of all the new business it might get and also the present business which it has, then it would have a loss, wouldn't it? A. Yes.

RE-DIRECT EXAMINATION.

We do not have a firm contract with the Grendel Mill, but they have assured us they would change over and electrify the mill immediately upon the building of

(703) this project. I assume they will take about six million kilowatt hours of firm power. In disposing of our dump power we hope to tie up to Mr. Phelps' steam plant, which is almost complete and sell him the dump power, which would be of mutual advantage to both of us.

F. R. SWEENEY, a witness for the defendant, being first sworn, testified as follows:

DIRECT EXAMINATION.

I am associated with Mr. Duncan as a consulting engineer on the Greenwood County project. I went to Washington for a conference with the Public Works Administration officials in connection with this project three or four times. I was present at the hearing in July, of 1934. (No one there made a suggestion with regard to the Duke Power Company rates to me or in my presence. No one made any suggestion that I can recall about Greenwood County's rates in my presence except for that preliminary remark of Mr. Rau's before we went into the checking over of the estimate. In my opinion, as an engineer, the effect upon the Duke System of the development and operation of the Buzzard Roost project would be proportionately neglible or comparatively negligible, I will say. The comparison I have in mind is as to the relative kilowatt hour output, ours being about thirty million kilowatt hours annually and I think, according to the latest report, Duke's output is about two billion.)

CROSS EXAMINATION.

My answer to that last question means that when the business which the Duke Power Company would lose through the Greenwood County plant is considered in comparison to the total business of the Duke Power Company that it would be proportionately small.

(704) Counsel for defendant, Harold L. Ickes, offered in evidence, and the Court admitted, as Defendants' Exhibit 79-A a letter dated December 18, 1934, to Hon. Paul H. Fall, Mayor, Hiram, Ohio, from Mr. Henry T. Hunt, Chairman for the Administrator.

Mr. D. W. ROBINSON, JR.: That letter is along the line of the letters plaintiffs introduced and along the line of the Greenwood County objection.

The COURT: Objection overruled, exception taken and allowed.

The letter reads as follows:

"Legal—WLG:dn docket 3412.

December 18, 1934.

Honorable Paul H. Fall,
Mayor,
Hiram, Ohio.

Dear Mr. Mayor:

With regard to the Hiram electric project, Docket No. 3412.

This Board has received copies of letters dated December 6 from the General Manager of the Ohio Public Service Company addressed to you and to Mr. R. Husselman, respectively. It appears by said letters that the Company has offered to supply the Village of Hiram with electric power at a rate of 2.5¢ per kwh for the first 25,000 kwh per month and 2¢ per kwh for all excess consumption.

It is of course the duty of the Public Works Administration to consider the social desirability of every project. In a project which, like the present one, contemplates construction of an electric generating plant, social desirability depends primarily on the economic advantage which the project will secure for the applicant. Therefore the project has been restudied in the light of the company's new offer.

Fixed production costs according to the estimates of the consulting engineer will be as follows:

Labor and superintendence,	$ 2,910
Maintenance and repairs,	280
Miscellaneous supplies and expenses including insurance	175
Total fixed operating expenses	$ 3,365
Total fixed charges (20 year loan)	1,659
Total fixed costs	$ 5,024

These costs are based on a two shift plant operation, whereas three shifts is the regular utility practice. The allowance for maintenance and miscellaneous expenses is insufficient to allow for emergencies and extraordinary repairs and to cover reasonable insurance. It is believed, therefore, that a conservative estimate of fixed costs should be about $1,000 higher than that of the consulting engineer.

Estimating the average cost of lubricating oil at $300, it is believed that the combined cost of fuel oil and lubricating oil will be approximately as follows:

(705)

Capacity		KWH	Gallons		
1 unit	2 unit	Output	Fuel oil	Price	Total
35%	17.5%	330,000	38,000	5c	$2,100
40%	20%	346,500	40,000	5c	2,300
42%	21%	363,825	42,000	5c	2,400
44%	22%	382,016	44,000	5c	2,500
46%	23%	401,117	50,000	5c	2,800
48%	24%	421,172	52,000	5c	2,900
50%	25%	442,230	54,000	5c	3,000

The following table presents a comparison of the cost of purchased power under the Company's offer and production costs in the proposed municipal plant during the first ten years of operation:

Year	Energy Generated kwh	Production Cost	Energy Purchased kwh	Cost
1st	330,000	$8,100	305,000	$7,600
2d	346,500	8,300	321,500	7,900
3d	363,825	8,400	338,825	8,276
4th	382,016	8,500	357,016	8,640
5th	401,117	8,800	376,117	9,022
6th	421,172	8,900	396,172	9,423
7th	442,230	9,000	417,230	9,844
8th	464,341	9,100	439,341	10,286
9th	487,558	9,200	462,558	10,751
10th	511,936	9,300	486,936	11,238
Total	4,150,695	$87,600	3,901,695	$92,980

In view of the fact that only 269,760 kwh were required to serve the municipal distribution system in 1933, and 265,680 kwh were required therefor in 11

months in 1934, it is believed that the above estimates of consumption are not too low. 25,000 kwh has been added to the estimate of energy generated to allow for energy used in the plant.

At present consumption it appears that the cost of purchased energy would be lower than the cost of production. However, allowance has been made for a steady increase in consumption. At the end of the 10 year period additional plant capacity would be needed to take care of the increase. The reserves required to be set aside out of revenues for this purpose would more than balance the saving of $5,380 over the 10-year period. Possibly some allowance should be made also for loss of taxes.

This Board has received a copy of Mr. Husselman's letter of December 11 to the General Manager of the Company proposing a rate of 2¼¢ per kwh if the quantity metered and billed per annum does not exceed 325,000 kwh, 2¢ per kwh if the quantity falls between 325,000 and 375,000 kwh and 1¾¢ per kwh if the quantity exceeds 375,000 kwh. A copy of the General Manager's reply has also been received. With regard to average rate, there is little difference between Mr. Husselman's proposal and the Company's offer. However, the type of rate schedule proposed by Mr. Husselman is not consistent with sound rate structure. It would result in the same charge for 365,625 kwh as for 325,000 kwh.

On the basis of available data it appears that the project will secure no economic advantage to the Village (706) and that it would be more desirable to accept the Company's offer than to construct the proposed plant. If the applicant concurs in this conclusion the proper procedure will be to withdraw the application as soon as it is clear that the new rates offered by the Company will be put into effect.

Would you be good enough to advise me of the Village's disposition in the premises.

Very truly yours,

HENRY T. HUNT,
Chairman,
For the Administrator.

The defendants rest.

(707) **PLAINTIFFS' EVIDENCE IN REBUTTAL.**

Plaintiffs' Exhibit No. 74, being a letter dated October 22, 1935, to Mr. John M. Wright, City Clerk, Eldon, Iowa, from Clark Foreman, Director of the Power Division, which was identified by Mr. Foreman, was admitted in evidence and reads as follows:

"Washington, D. C.,
October 22, 1935.

Mr. John M. Wright,
City Clerk,
Eldon, Iowa.

My dear Mr. Wright:

On examination of your application PWA Docket Iowa-1345 for a municipal light plant, we find that the cost of generating energy, including the debt service, will be 2.45¢ per KWH. According to our information, this cost will be considerably greater than what you will have to pay the private utility in order to buy the power. We are calling this to your attention so that you may avail yourselves of the cheaper cost if you so desire.

Our interest, particularly, is that the consumers get as low a rate of possible. On the basis of our examination, it appears to us that your rates can be reduced and still allow for sufficient coverage to secure the loan. Please communicate with us at once on these points and let us know whether or not you would consider reducing your rates from 5¢ to 4¢, or if not, exactly what rates you would agree to.

Yours sincerely,

CLARK FOREMAN,
Director Power Division
For the Administrator."

Both defendants objected to the introduction of this exhibit upon the same grounds as previously stated. Objection was overruled, and exception duly taken and allowed both defendants.

Plaintiffs offered, and the Court admitted in evi-

dence, the following documents, copies of which are hereto attached, except 80, the original of which is being transmitted.

Plaintiffs' Exhibit No. 75 entitled "Federal Emergency Administration of Public Works, PWA Press Section, Release No. 1044", released Sunday October 28, 1934.

To the introduction of this exhibit both defendants objected upon the grounds previously stated, and upon the further ground that it was objectionable as a press release. Objection was overruled and exception was duly taken and allowed.

Plaintiffs' Exhibit No. 76 entitled "Federal Emergency Administration of Public Works, Administrative Order No. 76 (Supplement 1) subject: 'Power Projects' ", dated August 8, 1935.

Plaintiffs' Exhibit No. 77 entitled "Federal Emergency Administration of Public Works, Office Order No. (708) 43, subject: 'Power Projects' ", dated August 15, 1935.

Plaintiffs' Exhibit No. 78 entitled "Federal Emergency Administration of Public Works, Office Order No. 43 (Supplement 1) subject: 'Power Projects' ", dated August 23, 1935.

Plaintiffs' Exhibit No. 79 entitled "Federal Emergency Administration of Public Works, Administrative Order No. 76 (Supplement 2) subject: 'Power Project' ", dated August 15, 1935.

Plaintiffs' Exhibit No. 80 entitled "Federal Emergency Administration of Public Works, Administrative Order No. 109, subject: 'Power Division' ", dated December 19, 1935.

To the introduction of Plaintiffs' Exhibits 76 to 80, inclusive, both defendants objected upon the grounds previously stated, and upon the further ground that the evidence was not in reply. Objection was overruled and exception was duly taken and allowed.

Plaintiffs' Exhibit No. 81 being a primary power contract dated March 21, 1935, between Duke Power Co. and the Town of Greenwood, S. C., which provides in part as follows:

"(F) The Consumer (Town of Greenwood) agrees

that it will install and maintain all necessary and proper regulating and controlling devices in connection with its receipt, transmission, distribution, control, use and application of said electric power, and should the Consumer use or resell any part of said electric power for purposes requiring a continuity of service or control, not reasonably obtainable from the transmission system of the Power Company, it will install and maintain, or require to be installed and maintained; all proper auxiliary apparatus and devices made necessary by the use of said power for such purposes."

Plaintiffs rest.

Mr. D. W. ROBINSON, JR.: In order to preserve the record we move to strike from the record portions of the testimony which we have objected to, and which has been admitted over our objection, upon the grounds stated in the objection and upon the further grounds that since Mr. Ickes' testimony and Dr. Foreman's testimony has gone in, this testimony is now not competent.

Mr. SCOTT: We join in that motion.

The COURT: All right. I can't agree with you gentlemen on that. I think the testimony is admissible just as I have ruled it.

Mr. D. W. ROBINSON, JR.: Now, your Honor, I am not sure about the proper basis of the December 8, 1934, contract. Frankly we have no objection to the Court considering it, but I am somewhat of the opinion that perhaps the opinion of the Supreme Court would rather indicate it should not be received in evidence, in view of the superseding loan and grant agreement and in view of that I think I should move to strike it from the record. It came in as part of the old record.

The COURT: I will overrule your motion, and at the close of the argument that is going to be one of the questions I am going to decide, and I may be so impressed with the argument on one side or the other that I will want to strike it out, but I don't think so. I think it is part of the history of the whole transaction.

Mr. SCOTT: Show that objection for all defendants.

The COURT: I understand the controlling contract is the new one.

(709) PLAINTIFFS' EXHIBIT NO. 75.

"FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

PWA Press Section
Release Sunday, Oct. 28, 1934 Release No. 1044

An effective and, from a standpoint of training and experience, the strongest inspection organization ever assembled under one bureau to supervise peacetime construction is functioning in connection with the PWA program.

Determined to have a complete and incontestable record of construction activities, Public Works Administrator Harold L. Ickes today has in the field a force of more than 1,500 engineer inspectors.

Washington plans and approves and is responsible for the formulation of policies, but it is upon these men in the field that PWA depends for the actual execution of the great construction program. They are, in truth, the 'eyes' of the Public Works Administration.

It is their duty to see that the billion dollars allotted to non-Federal projects are honestly spent and that the more than 4,000 projects are honestly built.

They are on the job to protect the Government, the borrowing community, contractors and workers alike.

The inspectors see to it that the construction goes forward and is completed in accordance with contract provisions, plans, specifications and P. W. A. regulations.

They see that the quantity and quality of all materials entering into a project conform to the plans and specifications. Materials requiring laboratory tests are tested by nationally known testing laboratories and a record of such tests are furnished to the engineer inspector before he permits the materials to be incorporated in the project.

(710) The PWA inspection force is labor's gaurantee that workmen will receive at least the established wage rate for the class of work performed, and that no man works more than 8 hours a day or 30 hours a week except in cases of emergency and a few isolated cases where exceptional conditions justify more than 30 hours a week.

The safety of the workers is also their concern,

PWA having approved a manual of accident prevention in construction prepared under the supervision of the accident prevention committee of the Associated General Contractors of America.

The inspectors must approve all payrolls and vouchers, bills and invoices for all labor, materials and supplies. PWA inspectors are without authority over contractors whose responsibility is to the local body which borrowed or received a grant for a PWA project. But the control of a PWA inspector is effective, for Washington transmits funds only on satisfactory reports from the PWA inspector.

Their daily and weekly reports constitute a complete record of the project inspected and is the basis upon which the Government pays the grant and purchases the bonds of the applicant. The grant is 30 per cent of the cost of labor and material involved.

State, and local authorities, contractors and others in the early days of PWA complained of "red tape" without a proper understanding of the services performed by the field inspectors. There is a growing appreciation now, however, of what the inspection force is doing.

Unsolicited letters are being received from borrowers commending the work of the PWA inspectors assigned to their projects. These letters state that because of PWA inspection there has been general improvement in the standard of construction.

Compared to benefits resulting from adequate and competent inspection the cost is almost negligible. The (711) Inspection Division estimates that the average cost of inspection is less than one per cent of the total cost of a project.

This cost may be higher on some projects, depending on the location, size and nature, but the average is less than one per cent on PWA projects, whereas the average in private practice is about 2 per cent.

Hanging in the Washington office of Howard A. Gray, Director of the Inspection Division, is a large map dotted with hundreds of red, green and yellow-headed pins. The red dots show active projects where PWA inspectors are on the job. The green indicates projects already completed and the yellow those for which allot-

ments have been made and which will soon require the services of one or more inspectors.

From this map one may visualize the tremendous job already accomplished by the Inspection Division and the heavy task that lies ahead. At the close of the first week in October, 1,398 non-Federal projects, representing a total estimated cost of $758,561,298, were under construction; 211 costing $28,993,856 were under contract and 301 costing $54,071,979 were being advertised. Three hundred seventy-three non-Federal projects had been completed at an estimated total cost of $15,121,637.

Much work lies ahead for the inspectors. On October 6, 1,769 projects were classified as to status, as follows: Contracts executed by applicants, 260; contracts sent to applicants, 623; and allotments approved but contracts not drawn, 275.

In the field there are resident engineer inspectors, assistant engineer inspectors, relief engineer inspectors and supervising engineers working under the supervision of State Engineer Inspectors who are responsible to the Directors of the Inspection Division in Washington.

Some projects require the assignment of only one inspector. On others, depending on size, a score or more of men may be assigned. There are 53 PWA inspectors (712) watching the construction of the Chicago Sanitary District's $42,000,000 sewer job. There are ten inspectors each on the Midtown Hudson Tunnel and Triborough bridge projects in New York with more scheduled to go on duty as construction advances.

The North Platte hydro-electric project in Nebraska just getting under way will require between 30 and 40 Government inspectors as this development covers a distance of 40 miles.

Other big jobs for the Inspection Division are the Philadelphia-Camden high speed shuttle line across the Delaware River Bridge, the St. Paul-Minneapolis and Milwaukee sewage disposal systems, the Eighth Avenue Subway in New York City, the San Francisco waterworks and the Los Angeles schools repair and reconditioning program involving work on 131 buildings.

Almost every known type of construction has been undertaken in the PWA program. This diversity of type requires that the Government inspection force include among its personnel qualified representatives of every

branch of the engineering profession—civil, electrical, mechanical and even mining engineers.

In addition to the field men the Washington office has an engineering staff including technical experts on the construction of schools, colleges, theaters, auditoriums, churches, hospitals, prisons, jails, courthouses, city halls, and other State, county and municipal buildings, parks, streets, pavements and sidewalks.

Other technicians are responsible for the proper handling of all technical matters pertaining to the construction of electric power plants, light and power distribution systems, dams and hydro-electric plants.

Still another group handle bridges, arches, viaducts, culverts, subways and tunnels for thoroughfare. There is another section dealing with dry docks, slipways, submarine railways, yards, piers, wharves, seawalls, dikes, revetments, jetties, breakwaters, canals, levees and similar river harbor, seacoast and lake front improvements. (713) Another engineering unit handles technical matters pertaining to the construction of storn and sanitary sewers, sewage disposal and sewage treatment plants. There also is a group for water supply systems, including purification and treatment plants.

The personnel of the PWA inspection division has been selected with the greatest of care. Every effort has been made to enlist only men of good character and unimpeachable integrity with the proper educational qualifications and practical outside construction experience. As a result PWA has organized a capable force of inspectors, among which are many engineers of national repute.

To head the Inspection Division Administrator Ickes appointed Howard A. Gray. Mr. Gray's principal assistants are John T. Madigan, Assistant Director of Somerville, Mass.; J. G. Gholston, Chief Engineer, of Woodland, Miss., and Walter E. Buckingham, Chief Inspector of New York. Mr. Buckingham is in charge of the field forces. Mr. Gholston is in charge of all technical and engineering activities of the Divison."

(714) PLAINTIFFS' EXHIBIT NO. 76.

"P. W. 39579

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

August 8, 1935

ADMINISTRATIVE ORDER NO. 76 (Supplement 1)

SUBJECT: POWER PROJECTS, Examination of.

Administrative Order No. 76, creating the Power Division, stated:

'In the event that it appears impossible for the State Office to deal with these matters in a reasonable length of time through lack of qualified personnel or other cause, he shall forward the application promptly to the Power Division in Washington.'

This is not to be construed to mean that the liability of the personnel in one examining section in a State Office to handle power projects quickly, relieves the examiners of the other two examining sections from preparing their reports. For example, if legal personnel permits the legal report will be prepared in the field, even though the engineering and finance reports must be prepared in Washington because of lack of personnel in these two sections. It is expected that the majority of the finance reports can be prepared in the field, particularly where the security offered consists of general obligation bonds.

Attention is again called to the fact that preference shall be given to the study of power projects. These include all electric and gas generating and/or distributing systems.

(stamp signed) HORATIO B. HACKETT
HORATIO B. HACKETT,
Assistant Administrator."

(715) PLAINTIFFS' EXHIBIT NO. 77.

"P. W. 39864

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

August 15, 1935

OFFICE ORDER NO. 43

SUBJECT: Power Projects, handling of applications for.

The following procedure shall be followed in handling applications for publicly owned gas and electric facilities:

1. All applications which have been approved by the President but which have been held up in Washington for any cause should be referred immediately to the Director of the Power Division.

2. All dockets which have been approved by all three examining divisions, but which have not yet been transmitted to the Division of Applications and Information should be sent at once to the Director of the Power Division, who will have the necessary NEC-3 Forms prepared.

3. All applications which have been disapproved in the course of examination by the examining division, but regarding which the applicants have not yet been notified, shall be referred to the Director of the Power Division.

4. All dockets under study should continue to be handled as before until the study is completed, when they should be referred to the Director of the Power Division.

5. All new applications arriving from the field should be sent by the Projects Division directly to the Power Division.

6. When the Power Division has approved any application, the Director of the Power Division shall notify
(716) the Projects Division directly so that the application may be routed at once to the Division of Applications and Information.

7. All correspondence concerning power projects in which any technical or controversial question is involved shall be approved and signed by the Director of the Power Division. The Projects Division may, however, continue to prepare and dispatch routine letters which do not touch upon technical or controversial matters.

(stamp signed) HORATIO B. HACKETT
HORATIO B. HACKETT,
Assistant Administrator.

Asst. Adm.
Distribution:
General office only."

(717) PLAINTIFFS' EXHIBIT NO. 78

"P. W. 40191

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

Washington, D. C.
August 23, 1935.

OFFICE ORDER NO. 43 (Supplement 1)

SUBJECT: Power Projects, Handling of Applications for.

Paragraph 4 of Office Order No. 43 is amended to read as follows:

All dockets under study or in suspension shall be delivered to the Power Division not later than September 1, 1935. If the study can be completed by that time, the regular report should accompany the docket. If it is impossible to finish the study by September 1, a memorandum should accompany the docket, giving the Power Division the status of the examination.

(typed sgd.) HORATIO B. HACKETT
HORATIO B. HACKETT,
Assistant Administrator."

(718) PLAINTIFFS' EXHIBIT NO. 79

"P. W. 39837

FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

August 15, 1935.

ADMINISTRATIVE ORDER NO. 76 (Supplement 2)

Subject: Power Projects.

1. Application for publicly-owned gas and electric utility projects will be examined and forwarded to Washington within thirty days after receipt in the State Director's office. If for any reason this is not possible, the Central Office must be advised promptly.

2. All applications for publicly-owned gas and electric utility projects will be forwarded to the Central Office whether approved or disapproved (see procedure outlined in Administrative Order No. 75 for handling applications).

3. The Projects Division will furnish a report to the Director of the Power Division on Saturday of each week on the status of all publicly-owned power projects that have not been forwarded to the Power Division by the field offices.

(stamp signed) HORATIO B. HACKETT
HORATIO B. HACKETT,
Assistant Administrator."

Admn.
Distribution:
General.

(719) DEFENDANT'S EXHIBIT NO. 49.

The following is a part of the application of Greenwood County to the Public Works Administration for a loan and Grant introduced in evidence on the hearing

before Walters, Special Master, as defendants' Exhibit 49:

"The rates proposed are only slightly above the Tennessee River Valley Authority rates applied to Tupelo, Miss., and by this proposal and method we establish at our community a similar economical electrical service as that set up by the Tennessee River Valley Authorities development.

We believe that this project will also provide for the Federal Power Commission and our State Railroad Commission (which regulates rates) a proper and fair yardstick and measure of the cost of hydro electric power."

(720) DEFENDANT'S EXHIBIT NO. 78.

"FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

March 16, 1935

ORDER NO. 141

The Electric Power Board of Review is hereby dissolved and the dockets will be returned to the Public Works Administration.

The services of Mr. Henry T. Hunt, General Counsel, will be required for special assignments by the Administrator of Public Works in view of the pending new program; he will also have referred to him all questions relating to public works requiring legal interpretation. The Chief Counsel's opinions will be coordinated with the administrative procedure by routing through the office of the Director, Legal Division, Public Works Administration, before being presented for the signature of the Administrator.

(stamp signed) HAROLD L. ICKES,
Administrator."

(721) DEFENDANTS' EXHIBIT NO. 79.

"FEDERAL EMERGENCY ADMINISTRATION
OF PUBLIC WORKS

Washington, D. C.

January 30, 1935

Memorandum for Mr. Hunt:

On June 20, last a PWA allocation was made on Docket No. 5412 for a power plant for the village of Hiram, Ohio. This allotment was approved by the President on June 27. Subsequently the loan agreement was executed, both by the village and myself, and apparently all requirements for putting through this loan have been complied with.

Meanwhile, it appears that on December 18 you wrote to the Village recommending the withdrawal of the application. This was without my knowledge and in spite of an order that I issued several months ago to the effect that no one on the staff had the power to overrule the President.

In setting up the Electric Power Board of Review, it was my thought that it should pass upon power projects and report to me in case of disagreement with the action taken by the PWA staff. I never for a moment supposed that I was creating a body that, without consulting me, would overrule not only me, but the President, and assume the right of direct negotiation with the municipalities involved.

I would be glad to have you submit to me any facts which you think would make it my duty to rescind this allotment. In the future the powers of the Electrical Board of Review will be strictly confined to what I originally intended them to be, namely, the review of power projects and the making of reports and recommendations to me for my decision.

(typed signed) H. L. I.
Administrator."

(722) DEFENDANTS' EXHIBIT NO. 80.

FEDERAL EMERGENCY ADMINISTRATOR
OF PUBLIC WORKS

Washington, D. C., March , 1936.

THE CITY OF COEUR D'ALENE,
Couer d'Alene, Idaho.

(Attention the Mayor.)

GENTLEMEN: On November 23, 1934, you executed a contract sent you by Federal Emergency Administration of Public Works. Because of the institution of the suit by the Washington Water Power Company in the Federal District Court in Idaho that contract was never executed on behalf of the United States.

In August, 1935, the United States Circuit Court of Appeals for the 8th Circuit decided the case of *Arkansas-Missouri Power Co.* vs. *City of Kennett,* now reported in 78 Fed. (2d) 911. The Director of the Legal Division of P. W. A. subsequently called that case to my attention. It held that if the city signed a standard form of P. W. A. contract, then under the laws of Missouri the city was acting *ultra vires,* because the city was delegating legislative power with reference to the construction of its plant. While the correctness of that opinion seemed to be doubtful, and particularly in the possible application in other states, it seemed desirable to change our form of contract, so as to avoid the difficulties created by that decision by eliminating the features of the contract which had occasioned it. I, therefore, authorized the drafting of a new form of contract to accomplish that end. Many persons in P. W. A. had to be consulted, and although negotiations with several cities began in the (723) latter part of August, 1935, it was not until the latter part of September that the new form of contract had been worked out and approved by me. It took the form of an offer for a unilateral contract. On September 25, 1935, the old contract with the City of Hominy, Oklahoma, was abrogated and an offer in the new form was made by P. W. A. to that city. The old contract was involved in a suit then pending on appeal in the

Court of Appeals for the District of Columbia, entitled "*Oklahoma Utilities Co.* vs. *Ickes*"; the attention of the Court of Appeals was called to the new contract by a motion made in that case, and the case was remanded to the lower court.

Meanwhile there were negotiations with other cities with which P. W. A. had contracts, and abrogating agreements were thereafter signed and new offers made.

However, in the early part of November, in connection with the writing of the brief on my behalf as appellant in the case relating to the County of Greenwood, South Carolina, pending in the Court of Appeals for the 4th Circuit, my attention was called to the findings of the District Court and to the fact that that court had entered a decree against P. W. A. in large part because of certain provisions relating to rates. Those rates provisions had not been eliminated in the new form of contract. It was then decided that our former contract should be further revised so as to eliminate those provisions, in the belief that, even if the District Court in the Greenwood case had correctly interpreted those provisions of the contract, which we denied, the decision would be reversed as a result of the elimination of those provisions. Accordingly, I authorized work to be done on a new revised form of contract. This again took a considerable amount of time.

(724) The first of the new contracts in the revised form to be executed was with the County of Greenwood which was executed on November 30, 1935. As there were a large number of such contracts outstanding, negotiations with you for the execution of a contract in revised form were not begun until on or about December 23, 1935, by which time a decree enjoining you and me from proceeding with the contract of November 23, 1934, had been entered by the Federal District Court and an appeal had been taken therefrom.

Since December 23, 1935, some of my subordinates have been corresponding and conferring with your representatives with a view to the execution by you and the United States of a new contract which would be subject to the injunction decree and would not be effective unless and until that decree were vacated or appropriately modified. After much consideration you decided that you would not execute such a new contract unless and

until the injunction decree had been vacated or appropriately modified so as to permit its execution.

My reasons for desiring to enter into a new contract with you are not merely those which actuated me in approving the new form of contract above referred to but also the following considerations: When I authorized the contract to be sent to you, which you signed on November 23, 1934, and when certain letters and telegrams introduced in evidence in the suit now pending on appeal were sent out by me or my subordinates, I did not have called to my attention by my subordinates, and therefore did not have in mind, the fact that your bonds were to be general obligation bonds payable out of taxes.

(725). In a case where P. W. A. makes a loan to the city to be evidenced by revenue bonds, the sole security for the loan consists of the earnings of the project constructed by means of funds supplied by the United States. Under Title II of the National Industrial Recovery Act, no loans can be made which are not reasonably secured. Consequently, if the sole security consists of such revenues, I am obligated in deciding whether the loan should be made, to consider the prospective earnings of the project and it is therefore necessary for me to take into account the prospective rates that will be charged by the city and also to some extent the prospective rates that will be charged by the city's competitors, because prospective competitive rates may affect the earning power of the project and therefore the security of the loan.

Even in a case where the bonds are revenue bonds, our present revised form of contract provides that the United States shall have no rights or power of any kind with respect to the rates to be charged by the city, excepting only such rights as it may have as a holder of the revenue bonds under the laws of the State.

But where, as in your case, the loan is to be evidenced by general obligation bonds of the city, then, in determining the security of the loan, there needs to be considered merely the financial condition of the city generally and (except in unusual instances where a bad investment by the city in a project may seriously impair its finances) P. W. A. has ignored the prospective revenues of the proposed project and therefore likewise has ignored the rates of the city and of its competitors.

As you can well imagine, I am occupied with a multitude of duties daily and occasional errors are therefore (726) unavoidable. Because of that fact an error was made in including, in the contract with you, provisions with respect to the rates of the city; and for like reasons I approved without adequate consideration, an attitude, expressed in the letters and telegrams above referred to, suggested by some of my subordinates with respect to the rates and services of The Washington Water Power Company. I reached the conclusion several months ago that that attitude was entirely unjustified and have completely repudiated and abandoned it. I reached that conclusion when my attention was first again directed to the old contract and those letters and telegrams by reading for the first time, when the case was on appeal the opinion of the District Court in the case brought by The Washington Water Power Company. I regret that I did not read that opinion sooner, but must again explain that my multitude of duties makes it impossible for me to keep constantly and closely in touch with the very considerable number of suits in which, as Administrator, I am involved.

I then concluded that, unless a new contract could be made with you which could be justified without any regard to such considerations as the rates or services of the city or of The Washington Water Power Company, I would be obligated to rescind the allotment on which the old contract of November 23, 1934, had been based. Had I so acted, there would, of course, be no contract whatsoever, for the old contract has never been executed and is, therefore, not in effect. Upon reconsidering the project I approved the making of a new contract with you in the form herewith enclosed. In giving that approval I have considered solely (a) whether the project would be a proper part of the comprehensive program (727) of Public Works, (b) whether your general obligation bonds would be reasonably secured, (c) whether the project would help adequately to increase employment, and, (d) other factors required to be considered by Title II of the National Industrial Recovery Act and the applicable Executive Orders of the President. I have not given any consideration whatsoever to any other factors and especially have not considered (1) the rates which may be charged by you, (2) the rates or

service of the power company, (3) whether lower power rates are desirable, (4) whether it is desirable that you should own and operate your own power plants—these all being matters for your consideration.

I have no intention of ever executing the old contract or any contract containing those terms of that contract which are not also contained in the new attached contract. My position is that I have waived irrevocably all those provisions of the old contract not set forth in the new, and have completely abandoned, and regret that there was ever expressed by or for me, any intention to have any control of any kind of your rates or any interest in the rates or services of the power company or of the city.

I feel strongly that the constitutionality of the PWA statute (affecting the lives of millions of persons) should not be determined in a case involving a proposed contract containing certain of the provisions contained in the old proposed contract, and the approval of which was based upon the consideration of improper factors, I have therefore been considering whether it would not be for the best interests of the United States that the allotment upon which your contract was based should be (728) rescinded so that there would be no contract, in which event the case above referred to now pending on appeal would be wholly moot. Because it might be unfair to you, I have concluded that, instead of taking such a step, I will ask my attorneys to file in the Court of Appeals a motion calling attention to the facts set forth in this letter, to the proposed new contract, and to other relevant facts, and asking the Court of Appeals to vacate the decree of the lower court and remand the case in such a way as to permit the execution of the new contract and a new trial based thereon, at which trial evidence will be introduced in accordance with the foregoing.

It is my understanding that, if and when the present decree is vacated or appropriately modified, you will join with me in executing the enclosed new contract.

HAROLD L. ICKES,
Administrator.

(729) DEFTS. EX. NO. 80.

P. W. 51718

This exhibit is being transmitted to the Circuit Court of Appeals, the material parts being as follows:

LOAN AND GRANT AGREEMENT BETWEEN THE CITY OF COEUR D'ALENE, IDAHO, AND THE UNITED STATES OF AMERICA (P.W.A. DOCKET NO. 6695.)

1. *Loan and Grant.* The Government will aid in financing the construction of a water system, including sinking wells, installing pumps and a distributing system for water service and a Diesel engine generating plant and electric distributing system (herein called the "Project"), by making a loan and grant to the applicant in an amount not exceeding in the aggregate the sum of $650,000.

(i) *Security*: Payable as to both principal and interest from *ad valorem* taxes which may be levied without limit as to rates or amount upon all the taxable property within the territorial limits of the Applicant.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein agrees to purchase or to make any grant.

(c) *Plans and Specifications and Certificate of Purposes*: If the applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to comply with Title II of the National Industrial Recovery Act in all respects.

12. The Administrator shall have no right or power of any kind with respect to the rates to be fixed or charged by the Project.

13. This agreement is made with the express understanding that neither the loan nor the grant herein

described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or construction Docket No. 6695.

(730) DEFENDANTS' EXHIBIT NO. 81.

"LENAWEE COUNTY LIGHT & POWER COMPANY

Adrian, Michigan
August 13, 1934

Colonel Henry M. Waite,
Deputy Administrator,
Public Works Administration,
Washington, D. C.

Dear Sir:

We are advised that the application for a loan from the Public Works Administration by the village of Tecumseh, Michigan, for a municipal electric light plant and distribution system contained a statement to the effect that the undersigned, the Lenawee County Light & Power Company, is without a franchise to occupy the streets in the village of Tecumseh for the purpose of distributing electric energy for lighting and other purposes. Lenawee County Light & Power Company does not concur in such a statement, and, on the contrary, takes the definite position that it has a perpetual right, protected by the Federal Constitution, to continue to serve the residents of the village of Tecumseh, Michigan, through the facilities situated in the streets of said Village.

In order to support the Company's contention in respect to its franchise rights in Tecumseh, we have obtained opinions of two of the outstanding attorneys of the State of Michigan, copies of which we are enclosing herewith for your information.

As we have at no time been afforded an opportunity to be heard in order to voice our opposition to the application of the Village of Tecumseh for the loan above referred to, we would very much appreciate it if, prior to the taking of any favorable action upon the applica-

tion, we may be given an opportunity to send a representative or representatives to Washington in order to present to your Board valid and sufficient reasons why the said application should be denied.

Will you kindly advise us as to the present status of the application and whether we may expect an opportunity to present to you our objections to the said application and the reasons why the same should not be granted?

Yours very truly,

(signed) D. E. BYERLEY,
Vice-President and General Manager.

DEB:L
ENCLOSURES

300328 AUG 15 '34"

(731) DEFENDANTS' EXHIBIT 82.

D. C. Green, Trustee

MIDDLE WEST UTILITIES COMPANY
20 North Wacker Drive
Chicago, Illinois

April 4, 1935

Henry T. Hunt, Chairman
Electric Power Board of Review
Federal Emergency Administration of Public Works
Washington, D. C.

Dear Mr. Hunt:

This refers to Dowagiac, Michigan, electric project docket #5995 and will confirm our telegram giving you a report on the election held April 1st, 1935.

Before giving you these results, it might be well to briefly review this project. Dowagiac is being furnished electric service by Michigan Gas and Electric Company, one of the operating units in the Middle West Utilities System. The electric franchise will remain in effect until 1953. The city owns and operates an electric plant from which it sells itself electricity for street lighting

and water pumping. On September 26th, 1933, a special bond election was held to determine whether the city should expand its municipal plant selling the bonds to PWA. In Michigan this requires a two-thirds majority vote of the taxpayers. At that election, 773 taxpayers voted in favor of the project and 420 against it. This lacked the required two-thirds majority.

The city continued to connect new customers to its own plant which prompted the Michigan Gas and Electric Company to secure an injunction restraining the city from connecting further customers. This injunction is still effective.

In the city's application to PWA certain lower rates were proposed. The Company agreed to meet the rates proposed for the municipal plant, in order to destroy the social desirability and self-liquidation of the project. These lower rates are now in effect in Dowagiac.

The election recently held on April 1st, 1935, was on the question—

"Shall the City of Dowagiac sell to its inhabitants electrical energy for their domestic, commercial and power uses,"

This was not a bond election either for general obligation bonds or for revenue bonds. The fact that this was not a bond election was emphasized by the city in its advertising and publicity prior to the election. In one circular prior to the election, the city made this statement—

"$1,000 reward will be paid to any person, or persons, who will prove that there is any bond issue to be voted on at the city election or that the municipal ownership ballot is other than just what it reads."

This circular was signed by the "Democratic Publicity Committee". In another circular the city had this to say:

"There are no bonds, we merely ask you for the right to sell the surplus electricity which we can generate with our present plant....."

(732). Copies of these two circulars are attached for your information.

It is significant to note here that reference is made to the present plant and not to any proposed or future plant. The voters were asured that there was no obligation on their part and that they were merely voting on the question of whether or not the city could sell energy to the citizens from the present plant.

The results of this election were 1,285 in favor of the question and 1,038 against. This count represents the total voters and not merely taxpayers.

The following table shows the comparison between the election on April 1st, 1935, and the previous election on September 26th, 1933. In this table, we are showing the total votes and not merely the taxpayer's votes in the 1933 election in order to show the comparison with the total vote of the 1935 election.

	For Municipal Ownership	Against Municipal Ownership
September 26, 1933,	1,116	527
April 1, 1935,	1,285	1,038
Gain	169	511

There was a heavier vote in 1935 than in 1933. The figures show, however, a much greater gain in votes against municipal ownership as compared to the votes in favor of it.

The April 1st, 1935, election shows that it was considerably short of the required two-thirds majority for general obligation bonds even if bonds were being considered. There would have been more votes against municipal ownership if bonds had been involved. The emphasis was on the fact that it merely represented a vote as to whether the city should sell electricity from the present plant.

Neither was the vote sufficient for revenue bonds which in Michigan require a 60% majority. In this case, as in the case of general obligation bonds, we think it is reasonable to assume that the city would not have obtained as many votes if the people had been voting upon the question of revenue bonds.

The election indicates to us an increasing sentiment

in favor of the company, prompted in part by the fact that we met the rates proposed by the municipal plant thereby destroying that apparent desirability of the project.

(733) It is the opinion of our attorneys that the election held April 1st, 1935, in no way changes the legal aspect. It is the opinion that the present injunction will still hold. It is further the opinion that the election in no way authorizes the city to add to the existing municipal plant or to construct a new one. Any move of this nature requires an election on the question of adding to the present plant or building a new plant and issuing of bonds of one form or another. The Michigan law further requires that the electorate be told frankly before the election that bonds are being voted. On April 1 the electorate was assured that no bonds of any description were being voted.

It is my purpose to be in Washington in about a week or ten days and I shall appreciate the privilege of discussing this matter with you further and giving you any further information on the matter that you may desire.

Yours truly,

(signed) EDWIN VENNARD.

Edwin Vennard
1v

(734) DEFT. EX. 83.

This Exhibit is being transmitted to the Circuit Court of Appeals, the material parts being as follows:

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the construction of a Diesel-electric generating plant and distribution system (herein called the "Project", such completed Project together with all additions, extensions and appurtenances thereto hereafter constructed being herein called the "System") by making a loan and grant to the City of Dowagiac (herein called the "Applicant") not exceeding in the aggregate the sum of $202,000.

(i) *Security*: Payable as to both principal and interest from, and secured by an exclusive first lien on, the gross revenues of the System after provision only for the reasonable operation and maintenance expenses thereof;

4. *Conditions Precedent*: The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(c) *Plans and Specifications and Certificates of Purposes*: If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Michigan and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof.

(735) DEFTS. EX. 84

This exhibit is being transmitted to the Circuit Court of Appeals, the material parts being as follows:

1. *Offer.* The United States of America (herein called the "Government") hereby offers to aid in financing the construction of a turbo-electric generating plant and distribution system (herein called the "Project") by making a loan and grant to The City of Sandusky (herein called the "Applicant") not exceeding in the aggregate the sum of $1,515,000.

(i) Security: Payable as to both principal and interest from *ad valorem* taxes which may be levied without limit as to rate or amount upon all of the taxable property within the territorial limits of the Applicant.

4. *Conditions Precedent.* The Government will be under no obligation to take up and pay for any bonds which it herein offers to purchase or to make any grant:

(c) *Plans and Specifications and Certificate of Purposes.* If the Applicant shall not have filed with the Government plans and specifications for the Project accompanied by a certificate of purposes setting out in detail the amounts and purposes of the expenditures which the Applicant proposes to make in connection with the Project, and the Government shall not have accepted such plans and specifications and such certificate of purposes as showing that the Project will be constructed in such a manner as to provide reasonable security for the loan to be made by the Government and to comply with Title II of the National Industrial Recovery Act in all other respects.

13. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged by the project, excepting only such rights as they may have as a holder of such bonds under the Constitution and laws of Ohio and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

14. This offer is made with the express understand-

ing that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project or to the financing or the construction thereof.

(736) DEFENDANTS' EXHIBIT NO. 88.

"MINUTES OF FINANCE BOARD OF GREENWOOD COUNTY

Greenwood, S. C., November 30, 1935.

After proper notice to all parties, a special meeting of The Finance Board of Greenwood County was held this 30th day of November, 1935.

Present: E. L. Brooks, Chairman, S. A. Agnew, R. C. Lominick, M. G. Bowles, and E. I. Davis, Secretary.

The following resolution was offered by Mr. Lominick, seconded by Mr. Bowles, and unanimously passed:

A RESOLUTION TO AUTHORIZE THE EXECUTION OF A SUPERSEDING LOAN AND GRANT AGREEMENT WITH HAROLD L. ICKES, FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, SUPERSEDING THE LOAN AND GRANT AGREEMENT OF DECEMBER 8, 1934.

BE IT RESOLVED by The Finance Board in meeting assembled:

WHEREAS, Greenwood County and Harold L. Ickes, Federal Emergency Administrator of Public Works, entered into a loan and grant agreement under date of December 8, 1934, as shown by the Minutes of this Finance Board;

AND, WHEREAS, The Finance Board and Harold L. Ickes, as Federal Emergency Administrator of Public Works desire to enter into a superseding loan and grant agreement as set out in a copy of the contract attached to these Minutes;

AND, WHEREAS, The Finance Board is of the opinion that it is to the interest of the County to enter into this superseding contract;

(737) AND, WHEREAS, the Hon. H. H. Watkins, District Judge of the United States District Court for the Western District of South Carolina, by injunction order of August 26, 1935, in an action by Duke Power Company, et al., against Greenwood County, et al., has enjoined the County from proceeding to build its Buzzard Roost Project with Federal funds and from proceeding under the contract of December 8, 1934;

AND, WHEREAS, this Board has no intention of violating the terms of that injunction order, from which an appeal has been taken;

NOW, THEREFORE, Be it Resolved:

1. That it is the sense of the Board that the loan and Grant Agreement of December 8, 1934, should be superseded by the Agreement attached hereto, so that this superseding loan and Grant Agreement, when delivered, shall constitute the entire agreement between the parties.

2. That the County Supervisor, County Treasurer and Secretary of the Board are authorized and directed to execute the superseding Loan and Grant agreement and to deliver an executed copy thereof to Harold L. Ickes, Federal Emergency Administrator of Public Works and to file with the records of the Board an executed copy.

3. That it is expressly understood that this superseding Loan and Grant Agreement is made subject to the injunction order of the 26th of August, 1935, and is not intended in any way to violate the terms of that Order.

There being no further business the meeting adjourned.

E. I. DAVIS, Secretary.

E. L. BROOKS, Chairman.

(738) DEFENDANTS' EXHIBIT NO. 89.

"RESOLUTION BY FINANCE BOARD FOR GREENWOOD COUNTY

Greenwood, S. C.
Dec. 2, 1935.

Pursuant to call by Chairman, a special meeting of the Finance Board for Greenwood County met in Office of County Supervisor, Court House, Greenwood, S. C., at 10 o'clock A. M., Monday, Dec. 2, 1935, E. L. Brooks, Chairman, R. C. Lominick, M. G. Bowles, S. A. Agnew and E. I. Davis, constituting full Board, were present.

Meeting was called to order by E. L. Brooks, Chairman.

Mr. M. G. Bowles moved the adoption of the following Resolution:

WHEREAS, according to Act #299, S. C., 1935, and as amended, rates for services furnished shall be fixed precedent to issuance of bonds and

WHEREAS, the original application filed by Greenwood County set up revenue table based on schedule of rates set up by Greenwood County which schedule was incorporated without alteration and

WHEREAS, Greenwood County has requested its Engineer to check income based on output and the proposed rates to be charged for services and

WHEREAS, the project Engineer reports that a thorough recheck has been made on production and income and that the rates set up in Bond Resolution are sufficient to liquidate the loan.

NOW, THEREFORE, BE IT RESOLVED by Finance Board for Greenwood County in meeting assembled this 2nd day of December, 1935, that rates to be charged by Greenwood County for services are as follows:

(739) SCHEDULE A

Greenwood County Municipal Power Plant

Wholesale Power Rates to Municipalities

Wholesale Rate:

Demand-Charge—$1.00 per K. W. per month
Demand-Maximum integrated sixty (60) minute period.

Energy Charge:

First—100,000 Kilowatt hours per month at 5. Mills per K. W. H.
Next—200,000 Kilowatt hours per month at 4. Mills per K. W. H.
Over—300,000 Kilowatt hours per month at 3. Mills per K. W. H.

In no case shall the energy plus the demand charge aggregate less than 7.0 Mills per K. W. H. for current consumed.

Minimum Monthly Bill:

$100 per K. W. per month, and in no case shall the minimum bill be less than the charge for sixty (60) per cent of the highest demand occurring during the previous consecutive (12) month period.

Adjustment of Demand Charge:

(a) Demand charge may be adjusted if, and when, Power Plant deems necessary to correct for power factors lower than eighty-five (85) per cent. Such adjustments will be made in such manner as to bring the demand charge to the equivalent af eighty-five (85) per cent power factor.

SCHEDULE B

GREENWOOD COUNTY MUNICIPAL POWER RATES TO INDUSTRIES AVAILABLE

To industrial power users demands in excess of 10 K. W. Service at primary distribution voltage or secondary distribution volt at discretion of PURCHASER.

Demand Charge

$1.15 per K. W. Per Month.
Demand-Maximum integrated thirty (30) minute period.

(740) *Energy Charge*

First 10,000 K. W. H. per month at 11.5 Mills per K. W. H.
Next 25,000 K. W. H. per month at 6.0 Mills per K. W. H.
Next 65,000 K. W. H. per month at 4.6 Mills per K. W. H.
Next 400,000 K. W. H. per month at 3.45 Mills per K. W. H.

Excess
Over 500,000 K. W. H. per month at 2.875 Mills per K. W. H.

In no case shall the energy charge plus the demand charge aggregate less than 6.5 Mills per K. W. H. for current consumed.

Minimum Monthly Bill

$1.15 per K. W. of maximum demand, but in no case shall the maximum demand for billing purposes be taken as less than 60% of the Maximum monthly demand billed during the preceding twelve (12) consecutive months period.

Seasonal Loads

Purchaser may in its discretion discontinue service on seasonal loads and establish a minimum payment for idle month sufficient to cover costs involved.

Adjustment of Demand.

Demand charge may be adjusted if, and when, power plant deems necessary to correct for power factor lower than eighty-five (85) per cent. Such adjustments will be made in such manner as to bring the demand charge to the equivalent of eighty-five (85) per cent power factor.

SCHEDULE C

RETAIL RATES TO RURAL CUSTOMERS

Available

To all rural customers:

First 50 Kilowatt hours per month @ 3.50¢ per K. W. H.
Next 150 Kilowatt hours per month @ 2.30¢ per K. W. H.
Excess over 200 Kilowatt hours per month @ 1.15¢ per K. W. H.

(741) *Minimum Monthly Bill*

5 Ampere Meter	$0.85
15 Ampere Meter	1.15
50 Ampere Meter	1.75

Motion by M. G. Bowles to adopt this resolution was seconded by S. A. Agnew.

After general discussion, Chairman called for a vote, which vote was as follows:

Those voting yes: S. A. Agnew, M. G. Bowles, R. C. Lominick, E. I. Davis and E. L. Brooks.
Those voting No: None.

Motion was declared carried by Chairman.

Meeting was adjourned in due form on motion made, seconded and carried.

E. I. DAVIS, Secretary.

E. L. BROOKS, Chairman.

(742) DEFENDANTS' EXHIBIT NO. 90.

"DUKE POWER SYSTEM

SALES OF ELECTRICITY (IN K. W. HRS.) AND GROSS REVENUE THEREFROM

(INTER-COMPANY SALES ELIMINATED)

	Kwhrs sold	Gross Revenue from sale
Year 1929	1,609,815,776	23,990,572.33
1930	1,405,112,928	22,276,841.66
1931	1,414,430,124	22,708,746.95
1932	1,337,735,087	21,091,593.77
1933	1,462,480,929	21,265,472.64
1934	1,328,637,162	20,167,530.38
1935	1,476,136,085	21,234,618.03
1936	1,791,232,706	24,097,803.61"

(743) DEFENDANTS' EXHIBIT NO. 91

DUKE POWER COMPANY

Kilowatt-Hour Output "Consolidated" North Carolina and South Carolina—1928-1936, Incl.

	(Typed)	(In Pencil)
1928	1,847,072,621	1,847,103,240
1929	1,981,239,709	1,981,839,540
1930	1,760,622,654	1,761,862,244
1931	1,766,921,211	1,768,184.411
1932	1,650,500,000	1,649,582,952
1933	1,679,906,454	1,765,737,132
1934	1,642,933,219	1,641,748,841
1935	1,792,111,249	1,790,819,741
1936	2,176,845,717	2,177,443,017

(744) Plaintiffs requested the Court to find the following facts:

I.

The plaintiffs are electric utility corporations engaged in the intrastate sale and distribution of electric power and energy within the State of South Carolina. Their business within said state and their rates for the sale and distribution of electric power and energy therein are subject to the exclusive jurisdiction, regulation and control of the Public Service Commission of said State. Under the statutes of said State plaintiffs are required, among other things, to adhere to the rates prescribed by the State authorities; to charge no other or different rates than those so prescribed; and to give no undue preference or advantage in rates or service to any customer or customers. Plaintiffs are required to maintain and operate their facilities so as to be able at all times to render adequate and efficient service to the public and they are not permitted to abandon any of their facilities or discontinue any part of their service, except for non-payment of undisputed charges, without first obtaining the consent of the proper State authorities.

II.

The plaintiffs have invested many millions of dollars in electric power facilities for the purpose of serving the territory in which they operate, including the Counties of Greenwood, Newberry and Laurens, in which the proposed Buzzard Roose project, if constructed, would operate in competition with plaintiffs.

III.

The plaintiffs are adequately serving said territory, and, for the purpose of conducting their business therein, have heretofore secured and now own and use valuable franchises and operating rights. Their established and available facilities are amply sufficient adequately to serve said territory for many years. Their rates have (745) been duly approved by said Public Service Commission of South Carolina.

IV.

On November 16, 1933, the defendant, Greenwood County, made application to the Federal Emergency Administration of Public Works for a loan and grant of federal funds to be made under Title II of the National Industrial Recovery Act in the amount of $2,627,197 for the construction on the Saluda River in the State of South Carolina, at a point known as Buzzard Roost, of a hydro-electric power plant, together with transmission and distribution lines extending into and through the Counties of Greenwood, Newberry and Laurens, for the purpose of engaging in the business of furnishing electric power and energy to municipalities, industrial enterprises, private individuals and the public generally for domestic, commercial and industrial uses. The application was approved by the Federal Emergency Administration of Public Works on June 20, 1934 subject to the execution of a contract satisfactory to the Administrator of Public Works between the United States of America and Greenwood County. Thereafter, on November 7, 1934 the amount of said proposed loan and grant was increased by the Federal Emergency Administrator of Public Works to $2,852,000.

V.

The County would put into said project no funds or property of its own and would not incur any liability or assume any obligation for either the construction or the operation of said project. The entire fund for the construction thereof, amounting in the aggregate of $2,852,000, would be advanced by the Federal Emergency Administrator of Public Works by way of a loan and grant of federal funds. The grant would amount to 30 per centum of the cost of the labor and materials employed upon the project, and no part of it would have to be repaid in any manner. The loan, covering the remainder of the entire cost of said project, including the (746) cost of the site, right-of-way, etc., would be represented by bonds to be issued by the County to the United States of America, both the principal and interest of which would be payable solely from the prospective revenues of the project.

VI.

The project would be a purely local and intrastate enterprise; it would be constructed primarily for the purpose of engaging in the utility business of furnishing electric power and energy to municipalities, industrial enterprises, private individuals, and the public generally for domestic commercial and industrial uses not only within Greenwood County but also without said County.

VII.

The Federal Emergency Administration of Public Works in determining whether to approve or to disapprove an application for a loan and grant of federal funds for the construction of a municipal power plant, such as the proposed Buzzard Roost plant, adopted and applied the criterion that no such application would be approved unless the rates of the proposed plant would be materially lower than the rates of the privately-owned utility with which the proposed plant would compete. Accordingly where the privately-owned utility agreed to put in effect rates at least as low as the rates of the proposed municipal plant the application was not approved. This criterion was adopted and applied by the Federal Emergency Administration of Public Works pursuant to its announced power policy to bring about the reduction of electric power rates so as to make electric energy more widely available at cheaper rates. The effect of this policy was to constitute the rates of the proposed municipal plant a standard or yardstick by which to measure, regulate and control electric power rates and to bring about reductions in such rates.

VIII.

The application filed with the Federal Emergency
(747) Administration of Public Works on November 16, 1933 stated that the rates of the proposed Buzzard Roost plant were only slightly above the Tennessee Valley Authority rates which would be applied in Tupelo, Miss., and that the proposed plant would establish, in the territory in which it would operate, an economic electric service similar to that set up by The Tennessee Valley Authority and would furnish a proper and fair yard-

stick and measure of the cost of hydro-electric power. On the application being filed the rates of plaintiffs, with which the proposed plant would compete, were investigated by the Federal Emergency Administration of Public Works, and the conclusion was reached that plaintiffs' rates were excessive. The rates of the proposed plant, being materially lower than plaintiffs' rates, the application met the required test of the Public Works Administration, and was accordingly approved pursuant to the policy of said Administration to approve applications for such plants as would be effective in bringing reductions in power rates in the localities in which such plants would be operated.

IX.

The rates at which the proposed plant would sell electric power and energy being materially lower than the rates of plaintiffs, the County, because of said lower rates, has been able to enter into contracts for the sale of a large part of the electric power and energy which would be produced by the proposed plant to consumers of power who are now, and for a number of years have been, customers of the plaintiffs. If the project should be constructed and put into operation the plaintiffs will be deprived of their customers in the territory in which the project would operate, and the property and business of plaintiffs will be seriously and permanently injured.

X.

The terms and conditions of the loan and grant, as approved by the Federal Emergency Administration of (748) Public Works, were first set forth in detail in a contract which the County entered into with the Administrator of Public Works on December 8, 1934. This contract was superseded by a new contract dated November 30, 1935. This new contract made no change in the character, scope or purpose of the project, in the nature of the business in which it would engage, in the territory in which it would operate in the event of its construction or in the necessary and inevitable effect on plaintiffs' rates. The new contract was not based on any new application by the County to the Federal Emergency Ad-

ministration of Public Works, but was entered into pursuant to the original application and to the resolutions of the Federal Emergency Administration of Public Works dated June 20, 1934, and November 7, 1934, approving said application. Under the new contract the same amount of federal funds would be advanced by the Administrator of Public Works by way of loan and grant, on terms and conditions whereby the County would make no investment of its own funds for the construction of the project, and would incur no liability and assume no obligation either for its construction or for its operation.

XI.

The new contract did eliminate the provision contained in the original contract requiring the County to "adopt a resolution satisfactory in form and substance to the Administrator providing for rates to be charged for services afforded by the hydroelectric system", but the rates to be charged by the proposed plant were not in fact changed, the rates set forth in the rate resolution adopted by Greenwood County on December 2, 1935, after the execution of the new contract of November 30, 1935, being the same as the rates originally set forth in the County's application filed with the Federal Emergency Administration of Public Works on November 16, 1933, and also the same as the rates set forth in the original rate resolution adopted by the County on October 1, 1934.

(749) XII.

The contract entered into by the County with present customers of the plaintiffs for the sale to such customers of a large part of the power which would be produced by said plant were entered into at the rates originally set forth in the County's application filed with the Federal Emergency Administration of Public Works on November 16, 1933. These contracts, and the rates set forth in them, were not changed when the new contract of November 30, 1935, was entered into, and if said plant is constructed said contracts will be carried out as originally intended.

XIII.

If said plant is constructed as proposed, the plaintiffs, in order to avoid the loss of their business and the consequent injury to their property, will be forced to make material reductions in their rates so as to meet the competition of the lower rates of said plant; and the direct, necessary and inevitable effect of said loan and grant for the construction of said plant will be to regulate and control the intrastate electric rates of the plaintiffs, not only in the territory in which said plant would operate, but throughout the entire territory in which plaintiffs do business.

XIV.

The proposed plant would not and could not be constructed and operated at rates lower than those of plaintiffs except for said loan and grant of federal funds, and the injury to the business and property of the plaintiffs and the loss and damage which they would sustain would be directly caused and brought about by said loan and grant of federal funds.

(750) WHEREFORE, the parties agree upon the above and foregoing statement of evidence as a true, full, correct and complete statement of all the material evidence taken and given on the trial of this cause.

This 1st day of July, 1937.

W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs, Appellants.

RUPERT A. DAVIS,
W. H. NICHOLSON,
D. W. ROBINSON, JR.,
Attorneys for Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, Defendants, Appellees.

ROBERT E. SHER,
Attorney for Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendant, Appellee.

IT IS ORDERED: That the foregoing Statement of Evidence, consisting of 201 pages, be, and the same is, hereby approved.

July 1st, 1937.

J. LYLES GLENN,
United States District Judge.

(751) **ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

United States District Court
West. Dist. of So. Car.
JUL. 1, 1937.
FILED
..... A. M. ..... P. M.
W. D. WHITE, Clerk.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. H. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

In Equity.

On motion of Counsel for both parties, it is Ordered:

That the Clerk of this Court do transmit to the United States Circuit Court of Appeals at Richmond, Va., for the use of that court, the following original exhibits in the above case:

1. Plaintiffs' Exhibit 12—Map of Plaintiffs' Transmission System in North and South Carolina.

2. Plaintiffs' Exhibit 36—Circular No. 1. PWA.

3. Plaintiffs' Exhibit marked Post Exhibit No. 10—

Loan and Grant Agreement between the City of Coeur d'Alene and the United States.

4. Defendants' Exhibit 5—Document No. 96 *re.* Santee project.

5. Defendants' Exhibit 8—General Contract Bid.

6. Defendants' Exhibit 9—Hydraulic Bid.

7. Defendants' Exhibit 10—Electric Generators Bid.

8. Defendants' Exhibit 11—Gates, rakes, etc. Bid.

9. Defendants' Exhibit 39—Federal Power Commission National Power Survey.

10. Defendants' Exhibit 49—Copy of Application of Greenwood County to Public Works Administration for Loan and Grant.

(752) 11. Defendants' Exhibit 46—Report of South Carolina Power Rate Investigating Committee.

12. Defendants' Exhibit 57—Minutes of hearing before PWA Electric Power Board of Review, July 2, 1934.

13. Defendants' Exhibit 70—Pamphlet issued by United States Government Printing Office, 1934, Senate Document 167, Public Works Administration.

14. Defendants' Exhibit 71—Pamphlet issued by United States Government Printing Office, 1936, Senate Document 183—Pending Non-Federal PWA Projects.

15. Defendants' Exhibit 72—Pamphlet issued by the United States Government Printing Office, 1936, Senate Document 184, Public Works Administration allotments for gas and electric projects.

16. Defendants' Exhibit 73—Pamphlet issued by United States Printing Office, 1936, Senate Document 193, Non-Federal Public Works Administration projects.

17. Defendants' Exhibit 74—Pamphlet issued by United States Government Printing Office, 1936, entitled: "first Deficiency Appropriation Bill—1936."

18. Defendants' Exhibit 75—Pamphlet issued by United States Government Printing Office, 1936, entitled "Revenue Bond Financing by Political Subdivisions."

19. Defendants' Exhibit 76—being a pamphlet entitled "Employment Created by PWA Construction" by Herman B. Byer of the Bureau of Labor Statistics.

20. Defendants' Exhibit 80—The loan and grant agreement between the City of Coeur d'Alene, Idaho, and the United States of America, attached to the letter of March 14, 1936, printed in the record.

21. Defendants' Exhibit 83—Letter dated December 31, 1935, being the loan and grant agreement between the City of Dowagiac, Mich., and the Public Works Administration.

22. Defendants' Exhibit 84—Letter dated January 15, 1936, being the loan and grant agreement between the City of Sandusky, Ohio, and the Public Works Administration.

23. Defendants' Exhibit 85—Book by Harold L. Ickes, entitled: "Back to Work."

24. Plaintiffs' Exhibit 80—Administrative Order 109 dated December 19, 1935.

This the 1st day of July, 1937.

(Signed) J. LYLES GLENN,
Judge of U. S. District Court.

(753)

United States District Court
West. Dist. of So. Car.
JUN 2 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

OPINION.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company, a Corporation Organized and Existing Under the Laws of the State of New Jersey, Complainant,
versus
Greenwood County, and E. L. Brooks, S. A. Agnew, and E. I. Davis, Members of and Constituting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.
} In Equity.

(754) PREVIOUS HISTORY OF THE SUIT.

This suit in equity now pending in the Western District of South Carolina has been before the District Court, the Circuit Court of Appeals for the Fourth Circuit and the Supreme Court. It had been before these Courts before it came to the attention of the Judge now charged with the responsibility for trial and decision in *in* mid-January of 1937. Originally the matter was heard before the District Judge, who after considering the testimony taken before a Master, granted an injunction. At that time the District Judge wrote an able and exhaustive opinion which is reported in 12 Fed. Sup. 70. On appeal to the Circuit Court of Appeals the suit was referred back to the District Court under the terms of an order dated December 5, 1935. This was done at the instance of the defendants who wished to have the matter reconsidered in the light of the change in the contract between the Administrator of Public Works and the Finance Board of Greenwood County with respect to the Loan and Grant of the money with which to build the municipally owned power plant on the Saluda River near Greenwood. Certain proceedings were then had in the District Court at Spartanburg, December 12th and 13th, 1935. Upon the case going back to the Circuit Court of Appeals it was argued and decision rendered. This decision, reported in 81 Federal (2nd) 986, was in favor of the defendants generally and reversed the District

Court. Upon appeal to the Supreme Court, the Supreme Court found that there had been substantial irregularities in procedure which it could not overlook and remanded the case to this Court with directions. The final paragraph of the Supreme Court's opinion reads as follows:

(755) "Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure. There is no exigency here which demands that these requirements should not be enforced. The cause was heard in the Circuit Court of Appeals upon a record improperly made up. That the cause may be properly heard and determined, we reverse the decree of the Circuit Court of Appeals and remand the cause with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts, and that the cause be retried upon the issues thus presented.

"We express no opinion on the relevancy or effect of the evidence, or otherwise upon the merits."

The Mandate ends with the following:

"On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, reversed.

"And it is further ordered, That this cause be, and the same is hereby remanded to the District Court of the United States for the Western District of South Carolina with directions to vacate its decrees and for further proceedings in conformity with the opinion of this Court.

December 14, 1936.

"You, therefore, are hereby commanded that such further proceedings be had in such cause, in conformity with the opinion and decree of this Court, according to right and justice, and the laws of the United States, ought to be had, the said writ of *certiorari* notwithstanding."

PRESENT STATUS OF THE SUIT.

Initially, therefore, we find the problem of ascertaining with accuracy the status of the suit as it stood before this Court in January, 1937, when the Mandate was actually filed in the office of the Clerk for the Western District of South Carolina. Various contentions are made thereabout but the Court is of the opinion that the case is back here for a trial *de novo* upon reformed pleadings. The reformation in the pleadings, responsive to the changes in the factual situation and resulting largely from the substitution of the new contract for the old, have been made and allowed by this Court. These (756) changes in pleadings were made as a first step in the retrial of the case after return to the District Court. Upon the case being assigned to the undersigned Judge for hearing and decision attorneys for all parties promptly appeared before the Court on January 19, 1937, and after considerable discussion of the meaning of the Mandate of the Supreme Court, the following changes were made.

On that date this Court signed an order, pursuant to the mandate, vacating the previous decrees of this District Court. The order in the second paragraph thereof allowed the defendants three days within which to file supplemental answers; the short time being accounted for by the desire for expeditious trial. The plaintiff was allowed ten days in which to file a reply to these supplemental answers. It was understood and conceded by all that these changes in the pleadings were the changes which were proper to carry out the following instructions contained in the opinion of the Supreme Court, to-wit:

"That the cause may be properly heard and determined, we reverse the decree of the Circuit Court of Appeals and remand the cause with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of the *existing facts*, and that the cause be retried upon the issues thus presented." (Italics ours.)

As a matter of substance the issues thus presented are properly stated, we think, in these supplemental answers and the resulting reply. The order signed by this

Court on January 19, 1937, preamble omitted, is set forth in full as a note in the margin.

After much argument and discussion of the exact status of the case, this Court is of the opinion that none of the former rulings of the District Judge, nor of the Circuit Court of Appeals on questions of either fact or law constitute findings and decisions which are now binding upon this Court, on the doctrine of the "law of the case". Confessedly the opinion of the Supreme Court of the United States is not the law of the case, nor does (757) it afford us binding guide for the decision of questions of law and fact, so far as the merits are concerned. The opinion declares that the decision of the Court, dealing with the procedural questions, is in no way binding on the lower Courts on the questions of admissibility of testimony, factual findings or decision of the several definite legal points involved. We find in the opinion words which positively negative such intention. The guidance which we get, therefore, from the previous decisions of the District Court, the Circuit Court of Appeals and the Supreme Court is that which learned opinions of able Courts always furnish from the standpoint of reasoning and decision about the matters involved in a controversy. Decisions in the previous history are not, in our view, binding on the theory of the law of the case. We, therefore, have entered upon the trial of this case impressed with the duty and responsibility of trying it *de novo*, which we believe is the force and effect of the opinion of the Supreme Court and the definite wording of the mandate remanding the case to this District Court.

NOTE 1: NOW, THEREFORE, in pursuance of said mandate, it is Ordered, Adjudged and Decreed as follows:

1. That the said decrees of this court entered in this cause on August 26, 1935, and on December 21, 1935, be, and the same hereby are, vacated, to the end that further proceedings may be had herein in accordance with said mandate.

2. That the defendants be, and they hereby are, allowed three days from the date hereof within which to file supplemental answers. and that the plaintiffs be, and they are hereby allowed ten days hereafter within which to file replies to said supplemental answers.

3. That further proceedings be had herein in conformity with the opinion of said Supreme Court, and that the parties may apply, upon due notice to this court, for such other and further orders and directions as may be necessary.

This 19th day of January, 1937.

J. LYLES GLENN,
United States District Judge.

Our failure, therefore, to be controlled by the previous opinions, previous findings of fact and conclusions of law is not to be construed in any way as lack of respect for the District Court or the Circuit Court of Appeals, but is to be construed as the result of independent thinking under a sense of responsibility for the decision of this case in a *de novo* fashion. It is contended that the findings of fact as rendered by the District Court are binding on this Court. We may adopt and use some of them and to that extent will feel ourselves indebted to His Honor Judge Watkins for the painstaking and able work which he has previously done, but we do not conceive that we are bound by them. During the course of this trial evidence was introduced which was not before him, we have allowed evidence which he did not allow to be introduced and manifestly it cannot now be said (758) that the findings of fact on the first trial are binding upon us.

It must be also declared, and the defendants' counsel are very frank in their admission thereabout, that the opinion of the Circuit Court of Appeals as rendered on February 22, 1936, and reported in 81 Federal (2nd) 986, is itself not binding upon this Court vested with the responsibility for the retrial of this case. We think that this would follow from the application of well settled principles of law, but we think it also follows from the definite wording of the opinion and mandate of the Supreme Court. If the findings of fact as made by the previous District Judge were binding upon us, or if the opinion of the Circuit Court of Appeals constituted the law of the case our problem would simply be to combine the two binding factors into a formal decree and make it effective by signing it and filing it in the office of the Clerk. Unfortunately no such easy solution of the controversy involved in this suit is possible to this Court. The very statement of such a solution, involving as it would the shifting of responsibility to abler and more honored Judges, is a temptation, but we do not conceive that such a course is possible here—it is not permitted by the law—it would not be in obedience to the mandate of the Supreme Court.

While counsel have not conceded that this statement of the status of the case before this Court is altogether correct, they have proceeded to the trial and argument of the case with full knowledge that the foregoing is a

statement of the Court's view thereabout and they have not been misled into trying the case without knowing that the Court was considering it from the very beginning as a trial *de novo* on reformed pleadings. An examination of the record plainly shows that the Court fully advised counsel for all parties of its views thereabout and the trial was conducted with this view constantly in the minds of all participants. So far as the presen-
(759) tation of the evidence is concerned, however, the Court is indebted to counsel for stipulations which saved a great deal of time and which presented to this Court, receiving it as *de novo* evidence, much of the evidence in exactly the same shape as it had been introduced on the first trial. For the fine spirit of cooperation and helpfulness, we commend counsel for all parties. In this regard this Court cannot go farther without expressing its gratitude and admiration for all counsel—the trial was had in four days which would otherwise have taken four weeks. This evidence was received by the Court as if being offered originally before it and we make this plain because the evidence presented in the trial of this case falls into several classes so far as its history is concerned. For example, there was the testimony originally taken before the Master, there was testimony taken before Judge Watkins in Spartanburg in December, 1935, pursuant to the remand order of the Circuit Court of Appeals, and finally there was the evidence actually introduced for the first time before this Court, hearing and seeing the witnesses originally. Where any of the evidence by stipulation was received by this Court trying the case in February, 1937, at Rock Hill, South Carolina, which had previously been received into the case either as being taken by the Master or being taken by Judge Watkins in Spartanburg, it was received by this Court as being original evidence introduced directly before the Court itself. The stipulations simply removed the necessity of producing the witnesses again or reading again into the record of lengthy documents. We trouble ourselves and the readers of this record to make this plain in the hope that again there may be no misunderstanding as to the ideas of procedure which were entertained by the Court trying the case. It would be grievous if this Court were to leave the situation in an indefinite state so far as the status of the case and the way in which the evidence was received are concerned.

(760) ANALYSIS OF THE LEGAL ISSUES.

We have in the foregoing paragraphs stated the history of the case up-to-date and our conception of its present status. These suits by utilities seeking injunctions against the Federal Emergency Administrator of Public Works and local agencies who are planning to build local power plants with federal loans and grants are now fairly common. A number of them have been before Circuit Courts of Appeal but none except this case has heretofore reached the Supreme Court of the United States. The issues are well understood by the bench and the bar and the public generally for that matter.

This particular bill in equity was filed in this Court against Greenwood County and its Finance Board seeking an injunction against the construction of a municipally owned power plant near Greenwood. The power plant which was to be built with money coming from a loan and grant agreement with the Federal Emergency Administrator of Public Works was to be a hydro-electric plant with a dam across the Saluda River at a location popularly known as "Buzzard Roost". Mr. Ickes, as Federal Emergency Administrator of Public Works, was made a party defendant by order of this Court dated December 4, 1934.

The bill asked for a temporary and a permanent injunction against the defendants going forward with this project on the ground that it would be bringing irreparable injury to the plaintiff, which company is engaged in the sale of power in Greenwood, Laurens and Newberry Counties, to which area the new plant proposes to furnish electric power.

It is asserted that the plaintiff is entitled to relief on arguments which are summarized as follows:

First, that the plaintiff has a right to bring this suit and ask for an injunction against the irreparable (761) injury about to be sustained from competition and indirect but nevertheless actual and substantial regulation.

Second, that the statutes on which the action of the Administrator and the County are based do not, when

properly construed, authorize what the Administrator is undertaking to do in this case.

Third, that these statutes properly construed even if they do embrace what is sought to be done here are unconstitutional and void. Three reasons for their unconstitutionality are set up. First, that the statutes involve an unconstitutional delegation of legislative power to the administrative agency. Second, the thing sought to be done by the Administrator and the local agency with the expenditure of federal funds is not within the powers delegated to the federal government under the Constitution. Third, that when the nature of the thing sought to be accomplished is viewed in the light of its reasonable, probable and even necessary result, it amounts in substance to an invasion of the powers reserved to the states and to the people under the Ninth and Tenth Amendments to the Federal Constitution; that the net result of the whole scheme, in which the contract is an essential but not an all inclusive part, operates to bring about a result that is inadmissible in view of the Federal Constitution.

The bill is answered by the contentions on the part of the defendants that the expenditure is justified under the General Welfare Clause of the Constitution as construed in the case of *United States* vs. *Butler*, 297 U. S. 1. That in any event the appropriation is made primarily for the purpose of relieving unemployment, both direct and indirect, and is therefore for the General Welfare. That in any event there is no coercion by the federal agencies and that the loan and grant are only made upon (762) the application of the local agency, acting freely and voluntarily, and that the federal government is no more than a giver of gifts and a buyer of bonds. The final answer is that in no event is there any invasion of the Ninth or Tenth Amendments or any of the reservations of powers to the people and the states which are found within the Constitution. By way of answer, it is asserted that whatever regulation may result, such regulation is so incidental and so remote that it is not the type of regulation of intrastate activities which is beyond the power of the federal government. Finally the answers say, adopting the legal positions taken by previous Courts, that the only damage resulting to the plaintiff would be damage from competition *per se* and

amounts to *damnum absque injuria*. The argument is made then that the plaintiff is in no way entitled to the injunction sought because no right, legal or equitable, is about to be violated.

In our opinion the higher Courts have attached considerable importance to the changes which have been made in the contracts evidencing such loan and grant agreements between the Administrator and the local authorities. In the instant case, the real heart of the Supreme Court's remand is found, we think, in the fact that there had not been sufficient independent treatment of the effect of the change in the contract. Had the Supreme Court not considered that the change effected between the first trial and the hearing before Judge Watkins in Spartanburg in December, 1935, was of great importance it would hardly have remanded the case for a trial *de novo*.

It is plain, therefore, that the solution of the problem will turn largely upon the interpretation of paragraph 12 of the loan and grant agreement dated November 30, 1935, because paragraph 12 is the substance of the change that was effected by the new loan and grant agreement. We cannot treat lightly the insertion of this paragraph in the contract. Confessedly also it was an attempt to (763) remedy the original vice in the Administrator's legal position to which attention had been called by the opinion of Judge Watkins and other decisions of Federal Courts. The curative effect must, therefore, be liberally interpreted. On the other hand, to state the plaintiff's contention briefly, the parties cannot by the insertion of a carefully worded paragraph cure a defect which permeates the entire program of the Administrator and set out in the contract as a whole. In short and to be specific, if the only reasonable, the necessary and the inevitable effect of the contract as a whole, and the fulfillment of it in a reasonable way is to defeat the intention expressed in paragraph 12, then it would be substituting words for substance to allow paragraph 12 to control our Findings of Fact. In short the government and the Finance Board cannot say in paragraph 12 that they have no intention of allowing the Administrator or his representatives to have anything to do with the control and the operation of the plant, if the only reasonable and inevitable consequence of the operation of the plant under the contract will be to bring about this result.

Words in a contract which negative the whole proposition and scheme of the activities dealt with by the contract as a whole cannot be allowed to control the interpretation thereof. It is significant in this connection to point out that Mr. Ickes, himself, confesses that paragraph 12 was drawn after the reading of the Court decisions and frankly admits that it was an effort to cure, at least in words, the vice which had been found by two Courts to be inherent in the original contracts. We, therefore, do not subscribe to the argument advanced from time to time by counsel for the defendants that the whole inquiry is put at an end when our attention is directed to paragraph 12 of the contract of November 30, 1935. We must still investigate the factual question of what is the natural and probable and the inevitable effect of the construction of the plant and the carrying out of the contract as a whole. To fail to do so would be stultifying (764) ourselves and solacing our consciences by attributing to the words used in paragraph 12 a magical, curative effect which it is impossible to attribute to them. The fact that the Administrator says that he will no longer seek to control the rates charged by the Finance Board of Greenwood County, that he will no longer require the passage of formal resolutions as to rates, is not going to destroy the dam when it is constructed, nor will the carefully guarded words found in paragraph 12 stop the flow of electricity along the lines to be built with the money furnished under the terms of the contract. So, welcome as it would be to find such an easy solution to the difficult case, we cannot in honesty say that the change from the original form, confessedly vicious, to the form found in paragraph 12 disposes completely of the issues raised by the plaintiff's bill. We must investigate the entire factual situation and say whether or not paragraph 12 can stand up legally and constitutionally when the rest of the contract and its natural and probable consequences are subjected to the tests which are brought into play by the issues raised in the pleadings. A man is presumed to intend the natural and probable consequences of his acts. Furthermore when simultaneous statements made in a semi-official manner evidence the intention to accomplish a result which is claimed to be illegal; when even the sworn testimony in an open Court of a Cabinet Officer admits that the natural and probable result of the construction

of such plants will be to indirectly bring about the regulation of rates charged by local companies, then the declaration of an intention to not control the rates of local utilities can hardly be said to furnish a complete answer to the factual inquiry. So regardless of the final decision of the entire case, it is plain that the plaintiff is entitled to have the case considered and the decision made from the evidence adduced on the entire case and not to be given as a result of well chosen words contained (765) in paragraph 12 alone. Confessedly the original contract reserved to the federal agencies powers which would have vitiated the whole program. The question now before us is, does the reformed contract so cure this vice as to remove the constitutional weakness of the whole program? It is true that the contract is not the entire case but it is the controlling piece of evidence in the case because the contract fixes the rights of the Administrator and the Finance Board of Greenwood County. We must take the contract as it now exists and are not free to speculate about the changes in the contract which may be made in the future. Should a substantial change be made then there would be a substantial change in the evidence to be presented to a Court.

As Courts have considered these cases in which utilities have sought injunctions against the building of municipally owned, competitive and duplicate power plants with federal money there has developed a line of decisions in which the decision has turned on the point that the plaintiffs are not entitled to injunctions regardless of the constitutionality of the basic statutes involved. This doctrine has been especially applied in the following cases: *Duke Power Company* vs. *Greenwood County,* 81 Fed. (2d) 986 (C. C. A., 4th); *Arkansas-Missouri Power Co.* vs. *City of Kennett,* 78 Fed. (2d) 911 (C. C. A., 8th); cf. *Allegan* vs. *Consumers Power Co.,* 71 Fed. (2d) 477 (C. C. A., 6th); *Kansas Utility Co.* vs. *City of Burlington,* 44 P. (2d) 223; Alabama Power Case just decided by the Court of Appeals for the District of Columbia.

The underlying principle of these five decisions is this as we understand it, that no matter how the Administrator may have exceeded his constitutional powers, no matter even if the statute on which he acts is unconstitutional as applied to this kind of action nevertheless that the plaintiff utilities whose damage is sustained

solely by reason of competition are about to sustain a
(766) damage which is "*damnum absque injuria*" and, therefore, have no cause of action. To state it as one of the counsel has stated it in arguing two of these cases to this Court, that the injunction of competition in the stream of proximate cause injects an insulation which protects entirely and completely from legal liability. It is said, when we read these decisions, that no cause of action will lie because there has been no invasion of any legal or equitable right of the plaintiff companies. It is said that no invasion of right is shown because the competition to be furnished by the municipally owned plant is in itself legal. We are endeavoring to ascertain and to state the reasoning which underlies all of these decisions for unless the fundamental principle is sound, then the decision of this case cannot be rested on such principle simply because it may be fitted conveniently into a jig saw puzzle in which the stated cases comprise the remainder of the desired figure. The idea of case law is carried to extreme perhaps in America but we are unwilling to decide the case merely because this case may fit conveniently into the pattern already drawn by other decisions. The fundamental principle is this, that the law is so jealous of protection of competition that where the damage to the plaintiff companies depends entirely upon damage arising from competition, whether such damage be actual destruction of plaintiffs' business or indirect regulation of earning power, there no cause of action will lie for conduct which in any way aids or abets such competition. In so many words do we understand the decision of the Circuit Court of Appeals of the Fourth Circuit. So spoke the Court of Appeals of the Eighth Circuit, so spoke the Court of Appeals of the Sixth Circuit and so recently has spoken the Circuit Court of Appeals, as it is now called, of the District of Columbia. Therefore, we must find as follows if we enforce this general rule, that even though the Administra-
(767) tor may be violating the Constitution of the United States in allocating the federal money for this project, even though Greenwood County may be acting unconstitutionally in surrendering its voice in the matter to the federal agency, yet because the net result of all this is simply to offer competition to the plaintiff company, the plaintiff company cannot complain and its rights have not been invaded. On this theory the govern-

ment becomes then, as admitted somewhat reluctantly we observe by Judge Groner, simply a buyer of bonds and a giver of gifts. It is then Greenwood County, a South Carolina municipal subdivision which is the active agent who competes with the Duke Company. That the Duke Company not being protected in any way from competition with a plant owned by Greenwood County has no right invaded, although Greenwood County may obtain the money with which the competition is financed in an illegal manner. To this doctrine the Circuit Court of Appeals for the Fourth Circuit have confessedly subscribed as applied to the facts of this case. The statement of the doctrine has for some time bothered this Court because it seemed to be an actual limitation upon the principle of law which the Anglo-Saxon jurisprudence has regarded as sacred; the principle summed up in the maxim *"ubi jus ibi remedium"*. But an answer to this fear is found in the statement that there has been no invasion of rights because no rights of this character existed. Therefore, the failure of the law to afford a remedy here is not a violation of the sacred fundamental principle. In short, it is said that the utilities are guaranteed by neither state nor federal law to be freed from competition from municipally owned plants and no matter how illegal the construction of the plant may be that, if the only way that it bears upon or has any effect upon the complaining plaintiff is through the channel of competition, then there is no invasion of right. It is declared that there is no *"injuria"* in the strict legal sense (768) of that word. That, therefore, there being no invasion of the right to be protected by any law, there is no duty upon the law to afford a remedy. If the foregoing reasoning is correct, and still our sense of justice is offended, the answer is that the sanction is political and legislative and not judicial.

While we do not wish to be understood as following, in our thinking, all of the cases cited by the various Courts of Appeal, we cannot lightly consider the fact that such a precedent has been laid down by so many eminent Courts. Particularly do we remind ourselves at this junction, and the chance reader of this opinion as well, that the majority of the Circuit Court of Appeals of this Circuit has already said that this is the law applicable to this situation. In the earlier paragraphs of this opinion we have stated that we do not consider this

former opinion as being the "law of the case" in the strict binding sense of that term, we do think, however, it is correct to say that where the majority opinion of the Appellate Court of this Circuit has already declared the rule of law applicable, there certainly must be some substantial change in the factual or legal situation to justify this Court in refusing to follow such an opinion. On this phase of the case there has been no change in the factual showing of any importance at all. The evidence on the question of competition and reasonable inferences to be drawn therefrom are the same today before this Court as they were when the Circuit Court of Appeals of the Fourth Circuit wrote its opinion in February of 1936. Instead of there being a change in the law on this phase of the case, the position of the Circuit Court of Appeals as there set forth now has the endorsement of three other Courts of equal rank. Therefore, this Court should not hesitate because of some small doubt which it may entertain as to the correctness of this legal proposition. To state the doctrine in its final form we quote from the Circuit Court of the Eighth Circuit (769) in the Kennett case:

"We know of no rule of law, however, which permits one indirectly hurt by the government expenditure to question the power of the government to make it. In fact, the rule is to the contrary."

We do not agree that the case of *Railroad Company* vs. *Ellerman*, 105 U. S. 166, supports the conclusion for which it is cited as authority, but this does not keep the rule as abundantly sustained by other authority from being binding upon us. Furthermore, we are greatly struck by the following observations of Judge Soper:

"The Power Company has such an interest in the business as to justify its suit. The practical effect upon his valuable property interests is manifest. It has an interest far more weighty than that of a federal taxpayer, which in *Frothingham* vs. *Mellon*, 262 U. S. 447, was held to be too remote, uncertain and insignificant to entitle him to injunctive relief against an invalid federal appropriation. The plaintiffs here conform to the rule laid down in that case since they show not only that the act by the Administrator was invalid, but that

they are in danger of sustaining a direct and substantial injury therefrom."

However, after considering the whole matter and after full realization that substantial damage is certain to result to the plaintiff company here within a limited area, we are forced to the conclusion that such damage so far as it results from competition alone results from no invasion of the plaintiff's rights; that, therefore, the damage is *damnum absque injuria* and that the plaintiff is not entitled to the relief sought.

When the Duke Power Company made its investment in and around Greenwood it was charged with the knowledge *the* such investment ran the risk of being damaged by competition. It was in the eyes of the law charged with the knowledge that such competition might come either from another private utility or that it might come from a municipally owned plant—competition from either source would be legal under their franchise and under the law of South Carolina. The higher Courts have now held that the financing of such competition by loan and grant from the federal government does not render such competition illegal and it must, therefore, follow, if this proposition is correct, that the plaintiff company is not entitled to its injunctive relief as sought in this bill.

(770) All of the cases taking this point of view have relied strongly upon the reasoning found in *Puget Sound* vs. *Seattle*, 291 U. S. 621. The opinion in that case does seem to sustain the decisions which rely on it. There the utility company resisted the tax because the city operated a plant, exempt from taxation, in competition with the private enterprise on which the tax was levied. Dealing with this question afforded the Supreme Court an opportunity to discuss the general question of competition between municipally owned plants and privately owned plants. We find for example the following language:

"In conducting the business by state authority the city is exercising a part of the sovereign power of the state which the Constitution has not curtailed. The decisions of this Court leave no doubt that a state may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise, levy a

tax to support it. *Green* vs. *Frazier,* 253 U. S. 233; *Jones* vs. *Portland,* 245 U. S. 217, and compete with private interests engaged in a like activity. *Standard Oil Co.* vs. *Lincoln, supra; Madera Water Works* vs. *Madera,* 228 U. S. 454; *Helena Water Works Co.* vs. *Helena,* 195 U. S. 383."

Over on page 625 we find language very helpful in the consideration of this case:

"The injury, which appellant fears may result, is the consequence of competition by the city, and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. * * * Legislation may protect from the consequences of competition, but the Constitution does not. *Helena Water Works Co.* vs. *Helena, supra; Vicksburg* vs. *Henson,* 231 U. S. 259. The Fourteenth Amendment does not purport to protect property from every injurious or oppressive action by a state. *Memphis Gas. Co.* vs. *Shelby County,* 109 U. S. 398, 400; *St. Louis* vs. *United Railways Co.,* 210 U. S. 266, 276; nor can it relieve property of congenital defects, *Madera Water Works* vs. *Madera, supra,* 456. It does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different. Those were risks which appellant took when it entered the field. No articulate principle is suggested calling for the conclusion that the appellant is not subject to the same risks because the competing business is carried on by the state in the exercise of a power which has been constitutionally reserved to it from the beginning."

(771) So far as competition *per se* and the resulting damage are concerned we are, therefore, willing to follow the above-cited cases and we think that their reasoning is at least highly persuasive, on the whole case, but right to be free from competition is not the only right which the utility company has under our federal and republican form of government. The competition complained of and which does cause an actual loss in dollars and cents by reason of the loss of business is a loss which might come under the legal classification of

damnum absque injuria; however, the instant plaintiff has another right—it has a right to have its intrastate activities regulated by a state agency if regulated at all. Here we may find the Latin phrase inverted and we may come to a situation aptly described as being *"injuria sine demno"*. Whatever regulation of intrastate transactions is to be had must be state and not federal regulation, if, therefore, we concede that no invasion of right arises from the competition *per se* and the resulting loss in money, this does not necessarily mean that the right to insist upon state regulation rather than federal regulation is not an independent right existing entirely apart from whatever rights the company may or may not have to be free from competition. Quite apart from the loss of money due to competition the company may sustain an *"injuria"* by reason of having its right of state regulation taken away and federal regulation substituted therefor. In other words, the right to live under a republican form of government is a right which no one would gainsay, the right to live under our federal system of government is a right which no one would attempt to deny to any person, natural or artificial. One of the rights under our federal system of government is the right to have intrastate matters and transactions controlled by the local government. The question is not which one of the controls is more beneficial to the particular person or his business. It may be that the state regulation of the utility is more to be dreaded than the federal (772) regulation. Historically the utilities have been complaining more of state regulation and under the Fourteenth Amendment have been seeking protection of the Federal Courts from the hardships of state regulation. Now the utility complains and says that the result of the whole scheme is to violate *its absolute right* to have these matters regulated by state authorities. It takes the legal position that regardless of whether the effect is beneficial or *deterimental*, this absolute right, guaranteed by the Federal Constitution, is about to be violated and that there is a threatened injury to this absolute right essentially constitutional in nature. So we say when this view is carefully considered that this Court does not concede that the case can be dismissed purely on the competition theory. Reluctant as we are, we are forced to the conclusion that the opinion of the Circuit Court

of Appeals for the Dstrict of Columbia does not examine the question of the degree to which the whole plan and its consummation will violate an utility company's absolute right to have its business, so far as the business is purely intrastate, regulated by state and not federal agencies. It is our view that it would be a violation of the Tenth Amendment to accomplish federal regulation of the local intrastate transactions to a substantial degree and thus displace state regulation even if this result was brought about through a loan and grant agreement resulting in the building and operation of a municipally owned and federally aided power plant. Indeed it was admitted during argument that the federal government would have no right to come down to Columbia, the state capital, and set up a federal board for the control of utility companies operating in South Carolina. This would be the extreme of federal regulation and would be clearly unconstitutional. It was further admitted that if in the contract and in the scheme of operations the federal government sought and obtained, whether by purchase of compliance or by demand of conditions precedent, rights which amounted in substance to a reservaton of control by the federal government this (773) two would be unconstitutional. The Administrator himself has practically conceded this question by excluding from the later contract all of the reserved powers over rates which were included in the original contract. Now, if we find that the inevitable, direct and substantial result of the loan and grant agreement and its consummation will be substantally to supplant state regulation with federal regulation, then we are forced to hold that the absolute right of the plaintiff has been invaded and if imminent danger and loss will follow then the plaintiff is entitled to injunctive relief. But if from the facts of the case it appears that the plan as a whole is constitutional under the general welfare clause and under our theory of one sovereignty aiding another, hereinafter more fully developed, and if the regulatory effect is merely incidental, immaterial and remote then we must deny the desired relief. In short, if regulation is so essentially a part of the scheme as it was in the Butler case as to vitiate the entire program, the decision must be for the plaintiff. If on the other hand the very nature of the resulting regulation is slight and incidental and

does not amount to a substantial supplanting of state regulation by federal regulation as a mater of fact, then we must deny the injunction and decide for the defendants.

Every federal expenditure which aids a local enterprise has some regulatory effect on the conduct of competitors. The question of degree is the controlling consideration. A man has a privately owned swimming pool as a part of a recreational enterprise in a small town, the American Legion Post in the small town gets an appropriation from the Public Works Administration to build a swimming pool within competitive distance. We agree that the private owner cannot complain of the loss of money due to direct competition, he has no right to be protected from such competition though financed by federal aid, but if the indirect regulatory effect goes so (774) far as to actually and substantially amount to a regulation by the federal government instead of by the state, then there would be an invasion of rights which would offend against the Tenth Amendment and against the whole spirit of the Federal Constitution. It is on this question of degree that we think that the plaintiff has failed to make out a showing in the particular case in the light of the existing second contract. The confessed attempt of the Federal Administrator to control the rates of the Duke Power Company through control over the rates to be charged by the Greenwood County Finance Board is removed by the change in the wording of the contract so far as the claim of right is concerned. The actual and substantial control is removed we think by a decision on the weight of the evidence and understanding of its legal effect.

As pointed out above every federal expenditure for the benefit of a local enterprise will always have some effect by way of competition on similar enterprises serving the same community. Illustrations carrying this truth to extremes could be cited—the soldier with his bonus is better able to compete with his neighbor across the street who has received no bonus and yet no one would dare to say that such competition was illegal. Many federal expenditures may have some slight regulatory effect on the business of those in competition with the recipient of the federal gift. Regulation is after all a relative term, but federal regulation to supplant state

regulation so as to render such federal regulation unconstitutional must be substantial and direct, not speculative and remote. So when viewing it from this angle, as when viewing it from every other angle, we are reminded that the solution of the case as a whole from the constitutional standpoint depends upon the degree and extent to which the whole scheme, appropriation by Congress, allocation by the Administrator, acceptance by the local Finance Board and the reasonable and prob-
(775) able effect of all of this tends to supplant state regulation with federal regulation.

So we must now examine the evidence on the regulatory feature of the case. It is here that the testimony and argument about the "yardstick" demands our attention. We think that the plaintiff has greatly magnified the importance of the yardstick in the case. To begin with the regulatory bodies of South Carolina being specialists in the business will certainly have acumen enough to understand that so far as the Greenwood project furnishes a yardstick to measure rates generally, it is a yardstick emanating from a very peculiar type of plant. We are certainly safe in assuming that the specialists serving on the South Carolina Public Service Commission or like body will understand that the plant is one financed entirely by loan and grant from the government. We cannot assume that the commission or regulatory body of the state is going to arbitrarily overlook this prominent factor in dealing with the regulation of the privately owned utilities operating in South Carolina. There is certainly nothing illegal in the study of the rates which will be charged by the new project and nothing illegal in the ascertainment of the rates which this project would justify. If there was any certainty that a yardstick when once ascertained would be used as a basis of control and regulation of the plaintiff's rates, the situation would be quite different. Rates are as a matter of practice and constitutional guarantee fixed by regulatory boards after consideration of investment and nature of service. We cannot assume that the South Carolina Public Service Commission or other regulatory body is going to stultify itself by failing to consider the major difference in the nature of the investment involved in the two plants. There certainly is nothing wrong in any government, state or national,

spending money to investigate the facts about a given business. Time will be to complain if after certain facts or yardsticks are ascertained, a regulatory body vested with the power seeks to apply such yardstick in an arbitrary, discriminatory and unjust manner. To justify (776) the granting of an injunction on the yardstick theory of the case, the plaintiff must show this Court not merely that the proposed rates will supply the yardstick, or furnish from a friendly source information about the costs of producing electricity, but that this yardstick when once ascertained is about to be used by a regulatory body in an illegal manner.

We, therefore, find as a fact, which we have stated independently in our separate findings of fact filed herewith, that the evidence does not show that the construction of this plant at the Buzzard Roost location on the Saluda River will bring about such a substantial control and regulation of the plaintiff's rates as to in fact and substance supplant state regulation thereof by federal regulation. We wish to make it plain that this is a ruling on the force and effect of the evidence with respect to this particular case. It may well be that a continuation of the policy to a very widespread extent might accomplish the result which the plaintiff claims is accomplished here.

The defendants' contention that the appropriation, loan and grant and use of money for the building of the power plant is justified under the general welfare clause of the Federal Constitution.

This phase of the case is the one most strongly relied upon by the defendants. Of course, this contention has recently been given a new meaning by the clear acceptance of the Hamiltonian theory of the General Welfare Clause by the Supreme Court of the United States in the case of *United States* vs. *Butler,* 297 U. S. 1. That decision sets at rest the old controversy as to the meaning of the General Welfare Clause in its relation to other clauses of the Constitution vesting power in the National Congress.

With all due respect to other courts, we approach this phase of the case from a slightly different angle from (777) that used in previous decisions. Citation and in-

creased importance attached to this new found power of expenditure for general welfare is not to be, in our opinion, a complete justification for all expenditures which Congress may see fit to make and which may be found in some way to be for the general welfare. There must be some limit to this power of expenditure. Without enumerating them all, the most important limitation on this power immediately suggests itself to us. The general welfare power may not be exercised to disturb the balance between the states and the federal government which exists under our constitutional system. The general welfare clause would become the whole Constitution if it could be used as a source of power to enable the Federal Congress to subvert the whole scheme of our federal government and thereby completely substitute federal sovereignty for state sovereignty. We think that a proper interpretation of the general welfare clause depends upon a proper appraisal of the two sovereignties involved. Certainly so far as the decision of this case is concerned, it is important to read the general welfare clause in the light of the question of sovereignty. The inclusion of the general welfare clause in the Constitution and the broad interpretation recently given it by the Supreme Court does not in any way disturb the inherent sovereignty of the states making up the Federal Union. But while we, as much as any Court, desire to maintain the integrity of the state and see all constitutional questions from the standpoint of one who realizes that the integrity and independence of the states must be maintained, yet we do not blind ourselves to the great benefits which have come from the federal government. While state did not lose their inherent sovereignty by adopting the Constitution, on the other hand the sovereignty of the Nation, derivative as it is, is not the sovereignty of some far off, distant, unsympathetic power. The federal sovereignty was created in the interest of the other sovereignties and was vested with those powers that were necessary to enable it to perform those functions best to be performed by a (778) centralized authority. Courts have found it necessary from time to time to locate the authority under our Constitution to perform certain functions and the very difficulty which the Courts have in drawing the exact line is itself a proof of the intimacy of the

sovereignty of the federal government with the sovereignty of the respective states. The contract embodied in the Constitution is an intimate one and must be construed in that light. The Constitution is not a non-intercourse document, it is a document which recognizes that there will be an intimacy between the states and the newly created federal sovereignty. The purpose of creating the federal government was "federal" in the original sense of that word; the states were to be tied together and the resulting compact was one of intimacy and not one of separation. We think, therefore, that there is nothing illegal or wrong from the constitutional standpoint in the fundamental principle that one sovereignty may aid another sovereignty. Certainly if the independent sovereignty of the United States may aid an independent sovereignty of an ally in war times, it should be able to aid the sovereignty of South Carolina from which it in turn draws some of its power. We cannot see why fundamentally one sovereignty may not aid another sovereignty in the accomplishment of a lawful objective. The fact that the aiding sovereignty is a federal government to which powers have been delegated in a written Constitution does not offend in any way against the fundamental conception that one sovereignty may aid another. The limitations on this aid under the United States Constitution are to be found then in the terms of the Constitution itself. The general welfare clause, therefore as we see it, must be understood in the light of this background and be declaratory of these fundamental truths of constitutional law. The power to aid arises, we think, from a higher source than the general welfare clause itself. It arises from the nature of the sovereignty involved and is justified by the occasion provoking its exercise. Sovereignty implies the location (779) of power and with this power goes responsibility for the welfare of the people themselves who are the original depositories of the power. The transfer of sovereignty from the people to the government is justified only on the grounds of necessity and the use of sovereignty is justified by what is necessary and best for the welfare of the whole people. This is the fundamental teaching of the Rousseauan idea of sovereignty which peremeates our national and state governments. The general welfare of the people of the United States is the

common concern of both the federal sovereignty, limited as it is, and of the respective state sovereignties, inherent though they be. The people of the United States are in the very nature of our government the proper destinatories of legislation passed for the general welfare.

Extended discussion by this Court of its ideas of sovereignty and the constitutional issues involved would serve no useful purpose. We have developed them to some extent because we think it is necssary to do so to make plain our decision in this case. It seems that the question is to be decided in the last analysis by deciding whether or not the case presents a situation controlled by the majority opinion in the case of *United States* vs. *Butler*, 297 U. S. 1. If we come to the conclusion that the regulation of the rates of the plaintiff company is such a direct, necessary and inevitable result of the course of conduct here contemplated as to fall within the condemnation of that opinion, then we have no alternative but to base our decision fairly and squarely on the Butler case and find for the plaintiff. If on the other hand, assuming that the plaintiff has a right to complain at all, we find that the regulation of the plaintiff's rates is a mere incident and collateral effect and not substantially the direct result of the intended course of conduct, then we must deny the relief sought by the plaintiff.

Somewhere between the two bold statements of the (780) extreme positions, this case lies. The first one is the proposition laid down by the plaintiff and admitted by the defendants. Congress cannot come into South Carolina and confessedly regulate the sale of electrical energy by a private utility to a private consumer. Such a transaction is an intrastate transaction according to common sense and according to the decision of the Higher Courts, and Congress cannot rob the State of South Carolina of this right to control such transactions. The rule goes further to hold that submission by the state and consent and acquiescence by the state authorities cannot add one whit to the power of Congress over such purely intrastate transactions.

The attempted surrender of sovereignty by a state or the shifting of responsibility in return for financial aid cannot be allowed to justify damage to a private citizen. South Carolina cannot lie down and say that it will

give power to the Federal Congress in return for money and thereby vest regulatory power in the central government which according to the Constitution is left, where it was originally, in the Sovereign State of South Carolina and there alone. This doctrine has been so well stated by Mr. Justice Sutherland in the *Carter* vs. *Coal Company* case that we refer to it here:

"State powers can neither be appropriated on the one hand nor abdicated on the other. As this court said in *Texas* vs. *White*, 7 Wall. 700, 725, 19 L. Ed. 227, 237, 'The preservation of the States, and the maintenance of their governments, as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States'. Every journey to a forbidden end begins with the first step; and the danger of such a step by the Federal Government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been (781) thought that such danger lurked behind its plain words, it would never have been ratified."

Such a shifting of responsibility from state to federal shoulders, even if accompanied with the passage of enormous sums of money is forbidden by our Constitution. We digress to say that it is not only forbidden by the Constitution but that it will be the beginning of the end, and may be half the journey toward the destruction of the indestructible states making up our indestructible union. The Supreme Court of the United States condemned the purchase of compliance as the mechanics set out in the AAA statute—every Court must condemn purchase of compliance seeking to accomplish an unconstitutional result, whether the compliance be by individual citizens as in the Butler case or by responsible state officers as alleged in the case at bar.

The defendants on the other hand, in their boldest statement of their position, maintain that the general welfare clause as now interpreted by the Supreme Court in the Butler case is a justification for practically any expenditure that inures to the general welfare of the citizens of the United States.

Therefore, deciding this case by the yardstick which was laid down in the Butler case, we come to the conclusion that no forbidden federal regulation is shown here. In thinking about this phase of the case, we call attention to the fact that even in *United States* vs. *Butler* there was nothing found wrong in the federal government promoting the general welfare by stabilizing the prices of agricultural commodities. The vice lay in the scheme adopted in that it sought to regulate in a far-reaching way intrastate activities. Furthermore, we cannot divorce our thinking about the aid rendered by the central government to the state governments or their subdivisions from practical considerations which are suggested by our national history. Historically the control over the moneys of the United States has been concentrated more and more in the federal government. For some reason the federal government has been comparatively efficient in the collection of its taxes and the securities of the federal government are rapidly absorbed on the money market. Another fact in our national history which is significant in this regard is the Sixteenth Amendment. All authorities on taxation have conceded that the income tax is a definite, easily enforced and productive source of revenue. Taxes are valuable for the raising of revenue primarily and other considerations thereabout are secondary. When the states, wisely or unwisely, adopted the Sixteenth Amendment they then surrendered to the national government the first call on this fertile source of revenue. Many other sources of revenue have been initially tapped by the federal government. So on the basis of fair play it is only right that in time of emergency the central sovereignty in strong position comparatively, should be ready to make available money and credit with which to aid local sovereignties in relief from a nation-wide depression. After all the whole body of the citizens of the United States and their welfare are the ones to be served by the exercise of sovereignty wherever located.

(782)

Relief of unemployment is the phase of general welfare most strongly relied upon in this case. It is the phase stressed in argument, because at the time of the passage of the act and the making of the loan and grant, it was conceived to be the most pressing need of the country at large.

We are constrained to believe that relief of unemployment in and around the proposed plant at the Buzzard Roost location on the Saluda River is not such a pressing need today as it is and has been in other sections. However, we must remember that the theory of relief of unemployment embodies both the direct relief and the indirect from the aid to capital industries. Furthermore, each appropriation for the general welfare must have, as previously pointed out, a place of local incidence. The allocation of this relatively small amount of $2,800,000 for this project is not out of line with the amounts to be spent on similar projects elsewhere in the nation.

(783) Another view of the factual situation seems to us to be significant. Greenwood County lies in the Piedmont Section of South Carolina. Its chief industries are production and manufacture of cotton. By reason of the development of the Piedmont Section of the Carolinas there has been an enormous increase in the last 25 years in the use of electricity in this section. Public records show that there has been an annual increase of 10%. This increase has gone on despite the ebb and flow of general economic conditions. A graph of which we take judicial notice shows that in March, 1933, when conditions were at their very lowest, the consumption of electricity in this section was three and a half times the consumption in January, 1920, when general business conditions in this section registered an all time high. While Greenwood is right in the heart of this section, the evidence shows that in Greenwood County only about 15% of the power is furnished by the Duke System; actually the larger part of the power has been supplied by local cotton mills from steam plants. The evidence supports the contention of the County authorities that while there has been a general movement of textile plants to the South in the last 20 years no new industries of substantial importance have been brought to Greenwood County. The opinion is held by the County that in lo-

cating new industries to consume power furnished by the Duke Company, that company has been minded to place them closer to its center of operations—to the north and east of Greenwood County. They have felt, therefore, that if the County had a municipally owned power plant of sufficient size and built at a low cost the County would be in good position to concentrate upon bringing new industries to Greenwood County as opposed to the whole general section being served by the Duke Company. The increase in the uses of electricity by the urban and suburban residents is patent to all. A service which was regarded as a luxury some years ago is now regarded by (784) all as a common necessity. That a service rendered to inhabitants of a municipality may as a matter of fact so change that the change must be recognized by the Courts has been recently declared in a vigorous opinion of the Supreme Court. There was a time when water was supplied to municipalities by private companies, as the cities have grown a private water company has now become a rarity. Indeed, that a supply of drinking and bathing waters is a proper function of a municipal government has come to be so well accepted that the superintendent of such service has been declared by the Supreme Court to be engaged in an essential governmental function. His services are considered so important a part of the municipal government that the Supreme Court of the United States has held that his income is immune from federal taxation. *Brush* vs. *Comr.*, 81 L. Ed. 443, October Term, 1936. With water so regarded we can see little difference between the service coming in underground in a pipe to a modern home from the service which is furnished by the electric power over wires above ground. So there is nothing novel in the operation of electric service by municipalities or the control of their use by municipal officers. Greenwood County has felt, according to the evidence, that it cannot only control the service to be rendered its present inhabitants but that by an intelligent operation of the plant new capital and new industries can be brought within its confines. Such competition as will result from this development is conceded by all to be lawful competition under the laws of South Carolina, even the plaintiff conceded this in pleading and at the bar of the Court.

CONTENTION OF PLAINTIFF THAT THE ADMINISTRATOR HAS ADOPTED CRITERIA OTHER THAN THOSE SET UP IN THE STATUTE. EVIDENCE RELATING TO THIS PRACTICE.

The plaintiff has offered in evidence a great number of documents as well as some direct testimony showing the manner in which the Administrator or his chief (785) assistants have acted with respect to other projects. This Court has thought that this testimony is admissible.. It is aware that such testimony was excluded by the trial Court in the District of Columbia. It also appears that this question was not dealt with by the Court of Appeals for the District of Columbia in its recent decision. The Circuit Court of Appeals of the Fourth Circuit has not specifically decided the question of the admissibility of this evidence, neither did the Supreme Court express its view thereabout on the occasion of the first appeal in the instant case. It is significant, however, we think that the Circuit Court of Appeals of the Fourth Circuit did in its opinion discuss some of the evidence of this character when ruling on the merits. The plaintiff contends that the evidence is admissible because it tends to show that the Administrator and his assistants, charged with large responsibility, had adopted a course whereby they set up the rate question as a criterion to determine whether or not a loan and grant should be made in a specific case. Of course, the controlling evidence is the evidence relating to the manner in which the instant application was considered and decided but we do think that the evidence of the Administrator's consideration and action on similar applications made under the terms of the same statute are admissible. This is particularly true in view of the wide range of choice given to the Administrator and the fact that the statute was a new statute and, therefore, a course of conduct could only be shown by consideration of the major cases which had been handled by the Administrator under the power given to him by the new statute. But it seems to be largely beside the point whether such evidence is admitted here *of* not, because the evidence constitutes records in other cases which have been decided by the Courts. Manifestly such records could be

resorted to to explain the real force and effect of other decisions even if they were not actually admitted in evidence in this case. It is only fair to comment that where the decisions have been favorable to the defendant Ad-(786) ministrator his counsel have been most happy and willing to make use of those decisions in support of their arguments. Manifestly an offering of the record on which those decisions were based amounts to no more than bringing to this Court "Transcripts of Records" in those cases. But apart from these considerations we think the evidence is admissible for the reasons stated on trial—we thought so on trial and still think so.

This evidence does tend to show two things. In the first place it tends to show that certain agents of the Administrator as well as the Administrator himself were at first very bold in the statement of the criteria they used in approving certain projects and denying others. It does support the contention that the criterion generally used was whether or not it was necessary to build a new competitive plant in order to force down the rates in a given community.

In the second place as testified by the Administrator himself in Spartanburg before Judge Watkins (evidence, which under stipulation is now before this Court as original evidence), there was a gradual recognition that the continued use of such a plan or scheme would endanger the constitutionality of the whole program. We might as well be frank about it, for it is clear that such decisions as Judge Watkins' original decision in this case and the opinion of the Circuit Court of Appeals in the Couer d'Alene case created doubts in the Administrator's own mind as to the wisdom of going too far into the rate question. Repudiation of the original position is abundantly evidenced. To name the major pieces of evidence is simply to remind ourselves of the following:

A. The frank changes in the contracts;

B. The appearance and testimony of Mr. Ickes himself on the rehearing of this Duke case;

C. The restriction of the authority of the Electric Board of Review;

(787) D. The rebuke given to its members;

E. Its final abolition and the memoranda repudiating the authority to make certain statements which had been made by this Board.

We mention all of this because it is plain that there was an original plan to allocate funds for competitive municipal projects largely on the basis of lowering the rates in a given community. If the existing utility lowered the rates voluntarily and was rendering adequate service there would be no need to build a competitive, duplicate plant. Regardless of its effect on the final decision of the case we think that the evidence in this regard is admissible and that it shows exactly what the plaintiff contends that it shows.

But even if there was a well thought-out plan and intention on the part of the Administrator to control rates in this way, this does not in itself render the action in a given case unconstitutional. The political, social or economic reasons behind a course of conduct of the executive officers do not decide the question of the constitutionality of their actions in a given case. Nor does the evidence which shows in a rather vivid way the mental processes through which the Administrator or his responsible assistants have gone mean that they have violated the terms of the statute under which they are acting. The political and social considerations supporting a statute are for the legislative and executive branches of the government. A Court when called upon to decide the constitutionality of such conduct is dealing with a question of power and not wisdom. So with respect to the charges of the violations of the statutory standards, if the Administrator thought about the political and economic phases of the application and intended project before rendering his decision, it does not make the decision rendered a violation of the statute, if the decision is sustainable on other grounds. Alexander Hamilton (788) in his first report on the National Bank argued brilliantly for the bank as being of great value to the trade and commerce of the citizens of the United States. Later Hamilton was called upon by President Washington to render a legal opinion as to the constitutionality of the bank. In this second report we find only an argument that Congress had the constitutional power to cre-

ate the bank. The fact that Hamilton had previously looked at the matter from the political, social and economic standpoint did not detract one iota from the force of his argument on the constitutional power. His arguments on the second question have become accepted as sound statements of American Constitutional Law and have been so regarded for over a century.

So while we may not agree with all that was said by the Administrator or his assistants in regard to the reasons advanced from time to time for the action taken, we cannot for that reason, set aside the decision as to the instant project. We think that this project in Greenwood County conforms to the statutory standards.

UNLAWFUL DELEGATION OF LEGISLATIVE POWER.

As to this contention we feel constrained to follow the decision of the Circuit Court of Appeals of this Circuit as previously rendered in this case, 81 Fed. (2nd) 986. While we are not bound by this on the theory of the "law of the case" we do feel constrained to follow it wthout further comment. However, since this decision and at a time when the question of unlawful delegation of power is being constantly raised before the Supreme Court of the United States, the Supreme Court has laid down the rule in strong language in *Cincinnati Soap Co.* vs. *United States,* opinion delivered May 3, 1937. We find the following language:

"The validity of the act disposing of the tax is also attacked as constituting an unlawful delegation of legislative power. That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appro- (789) priation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. A striking and pertinent example is afforded by the Act of June 17, 1902, c. 1093, 32 Stat. 388, where all moneys received from the sale and disposal of public lands in a large number of states and territories are set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories. The expendi-

tures are to be made under the direction of the Secretary of the Interior upon such projects as he may determine to be practicable and advisable. The constitutionality of this delegation of authority has never been seriously questioned. See *United States* vs. *Hanson*, 167 Fed. 881, 884-885."

While, of course, the statute there under consideration was not exactly the statute involved here, we think that this language is applicable to the statute involved in this case.

NATURE OF THIS SUIT.

This question can be disposed of very shortly. Counsel for both sides have referred from time to time to the nature of this suit. This discussion has been provoked, we think, by an undue importance attached to what has been called in these suits "The Right to Sue".

This Court thinks that there is no mystery about the type of suit brought here. It is simply a suit wherein injunction is sought against state and federal officers to prevent them from invading the constitutional rights of the plaintiff. It also seeks injunction on other legal grounds. This type of suit is so common in our American jurisprudence that there is no reason for misunderstanding as to the nature of the suit. Long ago this type of suit was recognized in law. As early as 114 U. S. 270, *Poindexter* vs. *Greenhow*, the Supreme Court said in discussing this type of suit:

"The ratio *decidendi* in this class of cases is very plain. A defendant sued as a wrongdoer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of the defense. He is bound to estabish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a de- (790) fendant, in order to complete his defense, to produce a law of the State which constitutes his commission as its agent, and warrant for his act. * * * The State has passed no such law, for it cannot; and what it can-

not do, it certainly in contemplation of law, has not done. * * *

"He stands, then, *stripped of his official character, and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defense.* * * * That which, therefore, is unlawful because made so by the supreme law, the Constitution of the United States, is not the word or deed of the State, but is the *mere wrong and trespass of those individual persons who falsely speak and act in its name.*"

This decision was followed by *In Re*: Ayres, 123 U. S. 507, and so on down through the decades this type of suit has been recognized and dealt with in many, many cases. It is the familiar type of suit by which the federal constitutionality of state statutes is decided in cases demanding a Three Judge Court. Indeed such a suit is an essential factor in the "Reign of Law" as we recognize it in England and America. It is the procedural method in which persons, natural or artificial, can seek protection from administrative agencies.

No mysterious element is introduced into the case because one of the defendants is a federal officer and the other defendants are a county, existing under the state law, and the members of a board specially created by state statute. The same fundamental principles govern the procedure for hearing and deciding the respective controverses between the plaintiff and each of the defendants. A federal officer may be sued personally to prevent him from enforcing an unconstitutional statute. Such a suit is, as has been decided time without number, not a suit against the government but a suit against the officer. The fact that he may defend on the basis of the statute authorizing his action introduces no mysterious element into the suit. Nor is complexity added because a county and its officers are joined as defendants.

Some suggestions were made by counsel for the de-
(791) fendants as to the applicability of the Eleventh Amendment. Nothing is better settled in American jurisprudence than the rule of law that such a suit as the one here is not a suit against the state so as to deprive the Federal Court of jurisdiction under the terms of the Eleventh Amendment. And that question even is beside the point here for the named defendants are not even,

in our opinion, officers of the state. Greenwood County is a municipal corporation existing under the laws of the State of South Carolina, but that such a municipal corporation enjoys no immunity under the Eleventh Amendment is well settled. The Finance Board of Greenwood County, while a group of men appointed under the terms of a state statute, have no statewide duties to perform and would not, in our opinion, enjoy such dignity as to be protected from suits by the Eleventh Amendment. It is familiar history that the Eleventh Amendment was passed to overrule the decision of *Chisholm* vs. *Georgia*. It has never been successfully contended that the purpose of the Eleventh Amendment was to prevent a person, natural or artificial, from testing the constitutionality of a statute, by bringing a suit against a state officer or against a municipal corporation about to enforce a state or federal statute. From the foregoing, it is certain, we think, that this Court has jurisdiction of the entire controversy here—of all the parties and of all the issues raised by the pleadings.

For the foregoing reasons, which must be read in connection with the separate Findings of Fact and Conclusions of Law which we have filed in keeping with the terms of Equity Rule 70½, we think that the plaintiff must be denied any injunction and that the bill must be dismissed on its merits.

(signed) J. LYLES GLENN,
United States District Judge.

Rock Hill, South Carolina, May 26th, 1937.

NOTE 2: The majority of this opinion was written before Monday, May 24, 1937, and the Court did not have the advantage of the decisions of the Supreme Court handed down on that day on the Social Security Act, but having read these decisions, we find nothing in them that would change our views, but on the contrary there is much that suports the views outlined in this opinion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
(794) WESTERN DISTRICT OF SOUTH CAROLINA.
IN EQUITY.

United States District Court
West'n Dist. of So. Car.
JUN 2 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

Duke Power Company, a corporation organized and existing under the laws of the State of New Jersey, Complainant,

versus

Greenwood County, and E. L. Brooks, S. A. Agnew and E. I. Davis, members of and constituting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

(795) FINDINGS OF FACT.

I.

This bill in equity was instituted in this Court November 7, 1934, against Greenwood County and the members of its Finance Board. Under order of this Court of December 4, 1934, Harold L. Ickes, as Federal Emergency Administrator of Public Works, was made a party defendant.

After the bill of complaint had been amended and supplemented February 4, 1935, this Court, for the reasons set out in its opinion of April 23, 1935 (10 Fed. Supp., 854), overruled the defendants' motions to dismiss by its order of April 29, 1935, and referred the matter to W. M. Walters, Special Master, to take the testimony. Testimony was taken before the Special Master June 12-19, 1935, and reported to this Court.

This Court, for the reasons assigned in its opinion of August 10, 1935 (12 Fed. Supp., 71), granted a decree for injunction in accordance with the prayer of the com-

plaint on August 26th, 1935. The defendants appealed to the United States Circuit Court of Appeals. By reason of the fact that during the pendency of that appeal the Administrator of Public Works and the County entered into a superseding loan and grant agreement of November 30, 1935, the Circuit Court of Appeals, on December 5, 1935, remanded the case to this Court (79 F. (2d) 955). Additional testimony was taken in this Court and the Court by its order of the 21st of December, 1935, refused to vacate the injunction order.

An appeal was thereupon taken by the defendants and under the opinion of the Circuit Court of Appeals of February 22, 1936 (81 F. (2d) 986), the injunction orders of the District Court were reversed and the bill ordered dismissed. The Circuit Court of Appeals, however, granted a stay order on March 17, 1936.

(796) *Certiorari* was granted by the United States Supreme Court on the petition of Duke Power Company, May 18, 1936 (298 U. S., 651, 80 L. Ed., 1379, 56 S. Ct. Rep., 941), and thereafter that Court, without expressing an opinion on the merits, by its mandate issued pursuant to its opinion of December 14, 1936 (81 L. Ed., 149), reversed the order of the Circuit Court of Appeals and remanded the cause to this Court, with directions to vacate the injunction orders of this Court of August 26, 1935 and of December 21, 1935, and *to re-try the case.*

II.

The Mandate from the Supreme Court was dated December 14, 1936, and was filed in the office of the Clerk of Court for the Western District of South Carolina on January 12, 1937. Immediately after the filing of this Mandate by arrangements between the Judges having jurisdiction in the Western District, this case was assigned to the undersigned Honorable J. Lyles Glenn for trial. Negotiations were then had with counsel for all parties with reference to the amending of the pleadings and trial of the case.

III.

This Court, by its order of January 19, 1937, vacated the injunction orders of August 26, 1935, and December

21, 1935, but on motion of the plaintiff granted a temporary restraining order, February 1, 1937.

On February 23, 1937, this case came before this Court at Rock Hill, South Carolina, for hearing on its merits.

IV.

The plaintiff, Duke Power Company, is a corporation organized under the laws of the State of New Jersey. It is engaged in the business, among other things, of generating, transmitting, selling and distributing electric power and energy within the States of North and (797) South Carolina. It is engaged in such business in the counties of Greenwood, Newberry and Laurens, South Carolina. During the pendency of this litigation the Southern Public Utilities Company was absorbed by the Duke Power Company. This was accomplished in accordance with the law of South Carolina and with the permission of the South Carolina regulatories bodies. For that reason we have referred to the Duke Power Company as the "plaintiff" throughout our trial of the case.

V.

The defendant, Harold L. Ickes (hereinafter sometimes called the "Administrator"), is the duly c and acting Administrator of the Federal Emergency Administration of Public Works (hereinafter called "P. W. A."), appointed by Executive Order of the President of the United States, dated July 8, 1933, in pursuance of the provisions of Section 201 (a) of Title II of the National Industrial Recovery Act, approved June 16, 1933.

VI.

Greenwood County, a political subdivision of South Carolina, having full constitutional and statutory authority to build and operate a hydro-electric plant at Buzzard Roost on the Saluda River (XXXVIII S. C. Stat. 411, 1392; *Park* vs. *Greenwood County*, 174 S. C.

35, 176 S. E. 870), estimated the cost of the construction of generating and transmission facilities at approximately $2,800,000.00, and applied to the Public Works Administration in November, 1933, for a loan and grant in that sum.

Without consulting with the P. W. A. the county prepared and included in its application a schedule of rates for the sale of electrical energy to various classes of customers. After the execution of the new contract of November 30, 1935, these rates were re-adopted by the County (Defendants' Exhibit 88), and have never been (798) changed since the time of their original inclusion in the application.

VII.

After full consideration by the Administrator an allotment was made for this project by the Administrator on June 19, 1934, and approved by the President on the following day. (Plaintiff's Exhibit 38.)

At the request of the Duke Power Company which was given a hearing on July 2, 1934, by the Public Works Administration in opposition to the allotment, the allotment was held in abeyance until November 7, 1934, when it was reaffirmed by the Administrator and the President. (Plaintiff's Exhibit 28.)

A contract was made between the Administrator and the County on December 8, 1934, which contract was later superseded by a new agreement (Defendants' Exhibit 80), on November 30, 1935, which is the only agreement now in effect. Under the provisions of this agreement the Administrator of Public Works agreed to make a grant to the County for the development of this project of thirty per cent of the cost of the labor and materials employed upon the project, not to exceed the sum of $682,000.00. The Administrator further agreed to buy such portion of the revenue bonds issued, $2,219,000.00 of 4% serial bonds, as is not sold to outside sources.

This contract provides that the funds raised from the grant and the sale of the bonds are to be used in the construction of a hydro-electric plant and a transmission system by Greenwood County.

VIII.

Under the existing contract dated November 30th, 1935, and still in force, the defendant, Ickes, has not reserved in express words any right or power to influence or control the rates to be charged by the proposed County plant (Paragraph 12, Defendants' Exhibit 80). Neither the United States nor the defendant Ickes has any power to control the operation of the project after construction is completed. The rights of the United States with respect to the construction of the project are fully set (799) forth in the contract of November 30, 1935 (Defendants Ex. 80.) The applicable provisions of the contract are found in paragraphs twelve and thirteen:

"12. The Administrator and the Government shall have no right or power of any kind with respect to the rates to be fixed or charged for the services and facilities afforded by the project, excepting only such rights as they may have as a holder of such bonds under the laws and the Constitution of South Carolina, and the lawful proceedings of the applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

"13. This Agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said project."

At the head of the P. W. A. is the Administrator, whose powers are plenary and subject only to the control of the President. He has complete supervision and direction of the Public Works Administration. The Public Works Administration is composed of a number of divisions, among which are the Legal Division, the Engineering Division, the Financial Division, and the Power Division. The first three of the foregoing are examining divisions, and their function is to examine and make recommendations to the Administrator with respect to applications for projects generally. The Power Division was organized August 1, 1935, and its function is

to examine and make recommendations to the Administrator with respect to the applications for electric and gas projects. In addition there existed at one time in the Public Works Administration an Electric Power Board of Review established May 9, 1934, which reviewed and considered protests with respect to electric power projects. The Electric Power Board of Review was dissolved by order of the Administrator on March 16, 1935.

X.

The State Engineers or Directors, each of the examining division of the P. W. A., the Power Division. (800) and the Electric Power Board of Review, have at all times had only advisory powers with respect to the approval of applications for loans and grants. None of these agencies had any power either by original authorization or subsequent ratification to make allotments or contracts or to make commitments with respect thereto, or to do anything whatsoever except to obtain information and to make advisory reports and recommendations to the Administrator. The power of approval or disapproval rested entirely with the Administrator and the President.

XI.

The application submitted by Greenwood County was handled in accordance with the procedure outlined in Findings 9, 10 and 14.

XII.

The determination to engage in the electric generating and distribution business was made by the properly constituted authorities of Greenwood County of their own free will. There was no solicitation or coercion on the part of the defendant, Ickes, his agents or subordinates. Any effect that the construction of the proposed County plant may have on plaintiff's rates or business will be the result of (1) the voluntary construction of an electric project by the County, and (2) *the voluntary decision of the County to use that plant in competition with plaintiff.*

XIII.

Manifestly it was the inauguration of the general plan of federal aid to municipal projects which put the idea in the minds of the Greenwood County authorities. While technically the Greenwood County authorities initially made the application they would never have had any shadow of a hope of financing such a project had it not been for the aid which was rendered by the federal government under the terms of the applicable statute. To contend otherwise is simply foolish in the face of the facts.

XIV.

(801) Upon his determination to approve a project, include it in the comprehensive program of public works, and make a loan and grant therefor, the Administrator submitted it to the President for his approval. When the action of the Administrator was approved by the President, funds were allocated for the specific project. (Plaintiff's Exhibit 38.) On March 20, 1934, pursuant to a Resolution (Senate Resolution 190, 73rd Congress) calling upon the Administrator to furnish the Senate with information including "A general survey of the public works program," an account of the organization of the Public Works Administration and a statement of its policies, the Administrator submitted a report to Congress, a document (Defendants' Exhibit 70), some three hundred pages in length, giving the information called for by the Resolution, including a detailed list containing the name, location and type of each approved project and the amount of funds allocated therefor.

Subsequent thereto the Administrator made supplemental reports to Congress (Defendants' Exhibits 71, 72 and 73), showing the allotments on non-Federal PWA projects, including in Exhibit 72 express reference to gas and electric projects.

Thereafter, on June 19, 1934, Congress enacted the Emergency Appropriation Act, fiscal year of 1935 (Public Act No. 412, 73rd Congress, 2nd session) which, among other things authorizing not exceeding $500,000,000.00 for public works under Title II of the National Industrial Recovery Act. On April 8, 1935, Congress enacted the Emergency Relief Appropriation Act of 1935, which, among other things, authorized the continuance of the Public Works Administration and the performance of

its functions, and made available additional sums for loans and grants to States, municipalities and other public bodies.

On June 22, 1936, by the First Deficiency Appropriation Act (Public Act No. 739, 74th Congress) Congress provided:

(802) "For useful public works projects of the kind and character for which the Federal Emergency Administrator of Public Works (hereinafter called the Administrator) has heretofore made loans or grants pursuant to title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935, the Administrator may, upon the direction of the President, use not to exceed $300,000,000.00 from funds on hand or to be received from the sale of securities, for the making of grants, to aid in the financing of such projects: Provided, That no part of the sum made available by this paragraph shall be granted for any project unless, in the determination of the Administrator, the completion thereof can be substantially accomplished prior to July 1, 1938, and adequate provision has been made or is assured for financing such part of the entire cost thereof as is not to be supplied through the Federal Emergency Administration of Public Works; Provided, further, That this limitation upon time shall not apply to any project enjoined in any Federal or State Court: Provided further, That is no case shall the amount of the grant exceed 45 per centum of the cost of the project. * * * *

XV.

9,389 non-Federal projects of many different types and extending into every county of the United States except three, have been approved by the PWA and funds allocated therefor, and funds aggregating $1,480,612,543.00 have been allocated therefor. Of this number 282 are electric power projects, 92 of which are located in places where privately owned electrical facilities are now operated. These 92 allocations total $27,339,947.00 representing less than one per cent of the total number of allotments, and 98/100 of one per cent of the total amount of allotments. In addition thereto $54,000,025.00

have been allotted for several large water projects, which include power generating facilities along with other features, such as irrigation, flood control and navigation.

XVI.

I find from the evidence before me that in all probability the revenue from this project will be ample to reasonably secure the revenue bonds preposed to be issued, and sufficient to provide for the maintenance and operation of the plant and for the payment of interest and the principal of the loan in accordance with Section (803) 21 of the South Carolina Revenue Bond Act of 1933 and the retirement schedule set out in the contract of November 30, 1935, (Defendants' Exhibit 80).

I find that the project will be self-liquidating and that if the Government advances the money on the bonds, such a loan will be reasonably secured.

XVII.

Congress, desiring to relieve the country from the severe economic depression, enacted Title II of the National Industrial Recovery Act for the purpose of increasing employment quickly. (Section 203.) The means employed by Congress for this purpose as set out in that

NOTE: §21. Rates for Service.—Rates for services furnished by any such system or combined system shall be fixed precedent to the issuance of the bonds. Such rates shall be sufficient to provide for the payment of the interest upon and the principal of all such bonds as and when the same become due and payable to create a Bond and Interest Redemption Fund therefor, to provide for the payment of the expenses of administration and operation and such expenses for maintenance of the system or combined system necessary to preserve the same in good repair and working order, to build up a reserve for depreciation of the existing system, project or combined system, and to build up a reserve for improvements, betterments and extensions to the existing system, project or combined system other than those necessary to maintain the same in good repair and working order as hereinbefore in this Section provided. Such rates shall be fixed and revised from time to time so as to produce these amounts, and the governing body shall covenant and agree in the ordinance authorizing the issuance of such bonds, and on the face of each bond at all times to maintain such rates for services furnished by such system, project or combined system as shall be sufficient to provide for the foregoing.

section and other sections, was through a program of public works, a portion of which was to be carried out by the National Government itself, and a portion to be carried out by the States of the Union and their subdivisions, aided by loans and grants from the Government of the United States.

I find that Congress' purpose of increasing employment is a proper national purpose and the expenditure of moneys for this purpose is authorized under the provisions of the United States Constitution.

I further find that the means used by Congress for relieving unemployment in so far as they affect this case, that is, the aiding of States and their subdivisions in the construction and financing of public works, are proper means of carrying out this national purpose of relieving unemployment.

XVIII.

I find that the defendant, Harold L. Ickes, Federal Emergency Administrator of Public Works, in making this allotment of funds to Greenwood County and in entering into the contract with the county, had no purpose other than that set out in the Act of Congress and that the policy of the Public Works Administration is cor-
(804) rectly set out in the Administrator's report to the United States Senate (73rd Congress, 2nd session, Senate Document 167; Defendants' Exhibit 70):

"The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works, thereby increasing the consumption of goods and also providing employment in the capital goods industry."

IX.

In view of the fact that the proposed loan to Greenwood County was to be evidenced by revenue bonds, it was necessary for the Public Works Administration, in order to carry out Congress' mandate that the loan should be reasonably secured (48 Stat., 203), to examine into the rates of the plaintiff who operated in the territory in which the Greenwood project would be developed. It

was necessary that the Administrator be satisfied that the County's proposed rates were low enough to obtain customers and high enough to yield a revenue sufficient to liquidate the bonds.

XX.

The rates charged by the Greenwood County project could not be a yardstock for rates charged by electrical utilities in South Carolina. From the evidence before me, and from the contract of November 30, 1935, between the Administrator and Greenwood County, it is apparent that there could be no logical comparison of construction costs between the Greenwood County project and any private utility project, as the contract contains numerous provisions as to labor and material to be used in the construction of the Greenwood County plant that would make its construction costs higher than the construction costs of a private utility plant not subject to the same contract provisions. A comparison of rates would not be practical in that a municipal plant is usually, though not necessarily, free of taxation, whereas (805) the overhead cost per kilowatt hour of a large utility, such as that of the Duke Power Company, would be substantially less than the overhead on the small plant proposed by Greenwood County. If Greenwood's project is, therefore, developed it would not operate as a yardstick by which private utility rates might be measured.

XXI.

The testimony shows that at the most the Greenwood County plant will produce about 25,000,000 K. W. H. Of this amount the County has tentative plans to sell about 12,000,000 K. W. H. to parties who are now customers of Duke Power Company. Duke Power Company, in the Piedmont Section of the Carolinas in 1936 sold 2,476,000,000 K. W. H. The increase over their 1935 sales was over 380,000,000 K. W. H. Thus the loss of 12,000,000 K. W. H. to Greenwood County will amount to only about 3% of the annual increase of the Duke Power Company. From a practical standpoint, it is inconceivable that this small competition would result, un-

der all of the evidence in this case, in a forced reduction throughout the entire Duke system.

In any event, the Duke Company in appearing before the South Carolina regulatory body with respect to its rates could show these pertinent facts in a very definite manner. We do not conclude that the competition of the Greenwood County plant would necessarily force the Duke Company to lower its rates throughout the system.

XXII.

The South Carolina Constitution of 1895, now in force in this State, provides by Article 9, Section 14, for a State Railroad Commission. This Commission is vested with the following duties and powers:

"§14. The Railroad Commission.—A Commission is hereby established to be known as 'the Railroad Commission,' which shall be composed of no less than three members, whose powers over all transporting and transmitting corporations, and duties, manner of election and (806) term of office shall be regulated by law; and until otherwise provided by law the said Commissioners shall have the same powers and jurisdiction, perform the same duties and receive the same compensation as now conferred, prescribed and allowed by law to the existing Railroad Commissioners: * * *"

At all times since 1895 there has been some regulatory body exercising power and authority under this provision of the Constitution. The names and personnel of the Commission have been changed from time to time but there has never been any substantial difference in their powers and duties. Control over electric and gas rates has at all times been an active question before the South Carolina regulatory bodies. There have been numerous hearings, orders, court proceedings, and many voluntary reductions in rates. All of these are matters of public record in South Carolina.

J. LYLES GLENN,
United States District Judge.

Rock Hill, South Carolina,
June 1st, 1937.

(808) CONCLUSIONS OF LAW.

1.

The applicable provisions of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, and the contract and the loan and grant involved in this suit are valid and constitutional.

2.

The applicable provisions of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, and the contract and the loan and grant involved in this suit involve valid expenditures for the general welfare, and involve no improper delegation of legislative power and no exercise of any improperly delegated power, and do not violate the Tenth Amendment or any other provisions of the Constitution.

3.

Title II of the National Industrial Recovery Act sets forth definite standards with respect to the purposes of the expenditures by the Administrator and the means by which such expenditures should be made. These standards, as administratively interpreted, were reaffirmed by the Emergency Relief Act, Fiscal Year of 1935, approved June 19, 1934, and were also reaffirmed by and incorporated in Section 12 of the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and by the First Deficiency Appropriation Act of 1936, approved June 22, 1936.

4.

If the making of the loan and grant results in lower rates, such result is but the incidental effect of what the States and their municipalities voluntarily decide to do, and therefore cannot have the effect of making such loan and grant invalid.

5.

The plaintiff, Duke Power Company, has brought a Bill in Equity seeking injunctive relief. The Bill simply asks for an injunction against Greenwood County, a South Carolina municipal corporation, and the personnel of the Finance Board of Greenwood County, created (809) under an Act of the South Carolina Legislature, and finally against Harold L. Ickes, as Federal Emergency Administrator of Public Works. The theory of the suit is that the Defendants jointly are about to make illegal use of Federal funds to the damage of the plaintiff. There is nothing novel or mysterious about this type of suit. It is neither a suit against the United States nor against the State of South Carolina. It is simply a suit where injunction is sought against State and Federal officers to prevent them from invading the Constitutional and other legal rights of the plaintiff.

6.

This Court is of the opinion that the rights sought to be protected involve both the asserted right to be free from damaging competition and the absolute right to have local transactions regulated by State authorities. Several of the Courts dealing with suits of this type have drawn no distinction between these two rights. This Court is of the opinion that there is a clear distinction between them. The Opinion filed herewith points out the Court's views at greater length.

7.

Lawful competition, even though financed by the Federal Government, does not in itself give rise to a cause of action, it is "*damnum absque iniuria*"—See five cases dealing with identical proposition involved here—page 12 of the Opinion.

8.

The fact that the plaintiff may not, however, be entitled to injunctive relief on the competitive theory alone does not prevent it from asserting its *absolute* right,

guaranteed by the Federal Constitution to have its local transactions regulated by State authority, if regulated at all. In short, the question here is not the effect of the regulation but the authority, whether State or National, which carries on the regulation. Beneficial National regulation would be illegal, if substantial. Harmful State regulation might be perfectly legal, unless it went to the extent of being arbitrary and unreasonable.

9.

Federal regulation which substantially supplants (819) and displaces State regulation, either directly or indirectly, would be in violation of the plaintiff's Constitutional rights.

10.

If Congress, in the exercise of a constitutional right, passed a law, the existence of an incidental motive or purpose which would not alone have justified the exercise of Congress' power will not serve to invalidate the law.

Arizona vs. *California*, 283 U. S., 423, 456.
Hampton vs. *U. S.*, 276 U. S., 394.
U. S. vs. *Doremus*, 249 U. S., 85.

11.

There is no doubt in the mind of this Court that, at the very beginning, the policy of the Administrator was to exercise rather a large authority over the operation of the Greenwood County plant. There has been, however, a complete change of the actual legal intention with respect to this control. Under the present contract, Greenwood County and its Finance Board are subject to, in the operation and management of the plant, regulatory bodies of South Carolina. The only limitation on this freedom of South Carolina is that control which the Administrator will find necessary to protect his interests as a holder of the bonds. This interest is comparable to that which the owner of a County bond has to require, by way of receivership or mandamus, that taxes be assessed, collected and applied to the payment of the bonds.

12.

The contract and the proposed loan and grant involved in this suit are made and being made in full compliance with the applicable statutes.

13.

The administrative interpretation of the provisions of Title II of the National Industrial Recovery Act with reference to the preparation of a comprehensive program of public works, as set forth in Finding of Fact No. 14, and in the inclusion of projects therein was a reasonable, practical and proper interpretation. Moreover, (811) that interpretation has been adopted, ratified and approved by the Congress by the subsequent statutes above referred to.

14.

The acts of the President and the Administrator in this case were not unreasonable and were within the range of sound discretion.

The acts of the President and the Administrator in approving and making the contract and the loan and grant called for the exercise of administrative discretion not subject to judicial review unless arbitrary and unreasonable.

15.

Greenwood County has full authority under the Constitution and laws of South Carolina to build and operate the proposed hydro-electric generating and transmission system.

XXXVIII S. C. Stat., 411, as amended.

Park vs. *Greenwood County*, 174 S. C., 35, 176 S. E., 870.

16.

The revenue bonds proposed to be issued by Greenwood County do not constitute debts within the meaning

of the South Carolina Constitution of 1895 (Art. X, Secs. 5 and 6; Art. VIII, Sec. 7), and will be valid under the Constitution and laws of South Carolina.

Park vs. *Greenwood County,* 174 S. C., 55, 176 S. E., 870.

Cathcart vs. *City of Columbia,* 170 S. C., 362, 170 S. E., 435.

17.

Greenwood County, by building its proposed hydro-electric plant and by simply competing with the plaintiff, will not infringe any legal right of the plaintiff for it is thoroughly settled that competition of a County or municipality violates no right of a public service corporation doing business therein when, as in the case of the plaintiff here, the corporation has no exclusive franchise.

Puget Sound Power & Lt. Co. vs. *Seattle,* 291 U. S., 619.

Madera Waterworks vs. *Madera,* 228 U. S., 454.

Greenwood County vs. *Duke Power Co.,* 81 F. (2d), 986.

(812) The fact that the South Carolina Legislature authorized and enabled the Greenwood County Finance Board to take advantage of the offers and financial aid made by the Federal Government through a Federal Statute does not in itself amount to coercion by the Federal Government.

It is true that, if the conditions of the benefits amount to substantial control by the Federal Government, then the device of offered aid and acceptance would not be allowed to accomplish an unconstitutional result. But, as we have set forth in the Opinion, there is nothing inherently wrong with the Federal Government aiding a State Government, provided no Constitutional provision is violated. The application of this principle of law in this case is, we think, in accord with the Opinion of the Supreme Court in *Carmichael* vs. *Southern Coal & Coke Company*—Opinion delivered May 24, 1937—wherein the Social Security Act was being attacked as being unconstitutional on the ground of coercion. At page 17, the Opinion says:

"The United States and the State of Alabama are not alien governments. They coexist within the same territory. Unemployment within it is their common concern. Together the two statutes now before us embody a cooperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other. The Constitution does not prohibit such cooperation * * *."

"* * * And, for the reasons stated in the opinion in the Chas. G. Steward Machine Co. case, we conclude that the deposit by the state of its compensation fund in the Unemployment Trust Fund involves no more of a surrender of sovereignty than does the choice of any other depository for state funds. The power to contract and the the power to select appropriate agencies and instrumentalities for the execution of state policy are attributes of state sovereignty. They are not lost by their exercise * * *."

(813) It is impossible to decide this case without considering the sovereignty involved. Sovereignty in the consideration of this case is more than an abstract conception. When viewed in the light of the American Constitution and American Constitutional history, it is a term explained by actualities rather than theories. Sovereignty has been so much discussed in our National history that it has come to be a term of political philosophy, having a tangible rather than an intangible meaning. Sovereignty is inherent in the States. Sovereignty for certain purposes has been delegated to the Nation. The people themselves are the original depositories of sovereignty under our American system of Government.

Regulation of industry of any kind, local in nature, is the proper activity of the State sovereignty and will not be held to be national, unless specially authorized by the Constitution.

That this conception of sovereignty is neither remote nor impractical is seen when we consider the many times that the Supreme Court of the United States has rendered its decisions in terms of the Sovereignty involved. For example:

"SOVEREIGN PEOPLE.

The words 'sovereign people' are familiarly used to describe the political body, who, according to our republican institutions, form the sovereign, and who hold the power and conduct the government through their representatives. Every citizen is one of these people and a constituent member of this sovereignty. *Scott* vs. *Sandford,* 60 U. S. (19 How.) 393, 404, 15 L. Ed. 691."

20.

FUNCTION OF THE COURT.

It is well to state our conception of the function of Court in ruling upon an important Constitutional case involving the relations between the States and the Nation. This duty is nowhere better described than in the case of the *United States* vs. *Butler,* 297 U. S. at page 62.

"There should be no misunderstanding as to the function of this Court in such a case. It is sometimes said that the court assumes a power to overrule or control the action of the peoples representatives. This is a misconception. The Constitution is the supreme law of (814) the land ordained and established by the people. All legislation must conform to the principles it lays down. When an act of Congress is appropriately challenged in the Courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty,—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and having done that, its duty ends."

(815) We conclude finally:

(a) That the plaintiff is not entitled to the injunction prayed for in the Bill of Complaint, or any other Equitable relief in this action.

(b) That the Statutes involved, as applied in this action, are not unconstitutional.

(c) That although the result, direct and inevitable, of the building of the plant contemplated by Greenwood County will be to compete with the Duke Power Company, Plaintiff, and, although this competition will render substantial injury, that, so far as the competition itself is concerned, it does not amount to an invasion of the Plaintiff's rights and such injury is, therefore, "*damnum absque iniuria*" in the eyes of the Law.

(d) That this holding does not deprive the plaintiff of its rights to have its other asserted rights tested on their legal and factual merits; it does not entitle the Defendants to a dismissal of the Bill for this reason and this reason alone.

(e) That the Plaintiff has an absolute right to have the balance between the State and Federal Regulatory Authority preserved as it exists under the Constitution; that if this balance is disturbed in a substantial way, the plaintiff would be entitled to relief.

(f) That the Plaintiff has failed to show by the greater weight of the evidence that he is entitled to this relief, this decision being on the weight of the evidence and not denying in any way the existence of the legal right.

The legal right here is that of "*iniuria sine damno*", the classical illustration of this right being *Ashby* vs. *White*, 1 Smith's Leading Cases 251.

(g) That the other grounds on which the plaintiff seeks to have the action of the Administrator of Public Works and the Finance Board of Greenwood County enjoined are without merit.

(816) (h) That on the phases of the case, which are not discussed separately and dealt with in these Conslusions of Law or in the Opinion filed herewith, this Court adopts as its Opinion on the Law the decision of the Circuit Court of Appeals for the Fourth Corcuit in the case of *Greenwood County* vs. *Duke Power Co.*, 81 Fed. (2d) 986, being the instant case on the first appeal.

(Signed) J. LYLES GLENN,
United States District Judge.

Rock Hill, South Carolina,
June 1st, 1937.

(817)

United States District Court
West. Dist. of So. Car.
JUN 2 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

(818) **FINAL DECREE DISMISSING BILL AND DENYING INJUNCTION.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company, a Corporation Organized and Existing Under the Laws of the State of New Jersey, Complainant,

versus

Greenwood County, and E. L. Brooks, S. A. Agnew and E. I. Davis, Members of and Constituting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

} In Equity.

This cause came on to be heard on its merits at the February Term of the Equity Court at Rock Hill, South Carolina. Testimony was taken and exhibits were offered and the case was argued by counsel.

The Court has filed its Opinion, which sets forth fully

the previous history of the case. The terms of Equity Rule 70-1/2 have been complied with and separate Findings of Fact and Conclusions of Law have been made and are filed herewith. A special situation with respect to the costs is outlined on the attached sheet, which is hereby made a part of this Decree. And, now thereupon, and upon consideration of the entire case, it is

ORDERED, ADJUDGED AND DECREED as follows, viz:

1. That the plaintiff be, and it is hereby denied any temporary or permanent injunctive relief of any kind, nature or description.

2. That all previous interlocutory injunctions and temporary restraining orders heretofore issued be, and the same are, hereby vacated and set aside.

3. That the plaintiffs' bill herein be, and the same is, hereby dismissed on the merits.

4. For the reasons stated on the attached sheet, it is hereby ORDERED, ADJUDGED AND DECREED that the costs be taxed one-half against the plaintiff, Duke Power Company, and one-half jointly against the defendants.

(Signed) J. LYLES GLENN,
United States District Judge.

Rock Hill, South Carolina,
June 1st, 1937.

(819) SPECIAL SITUATION WITH RESPECT TO COSTS.

Reference has been made throughout the Opinion and Findings of Fact and Conclusions of Law to the case of *Park* vs. *Greenwood County,* 174 S. C. 35, 176 S. E. 870. The record shows that in early October, 1934, the plaintiffs, Duke Power Company and Southern Public Utilities, now consolidated under the Duke Power Company, filed a petition for intervention in that suit. The scope of that petition suggests that it would have

raised all of the issues which are present in the instant litigation. This petition for intervention was resisted by the defendants and the intervention denied. By not being allowed to participate in that suit as a party, necessity resulted for this suit. This suit has had a long and expensive course. The presumption is that the South Carolina Supreme Court would have followed the proper methods of procedure, and with direct appeal to the Supreme Court of the United States, a much earlier and less expensive decision of the important questions involved here could have been had. It seems to this Court, therefore, that much of the delay may be traceable to the resistance on the part of the defendants here to the plaintiff's petition for intervention in that suit, brought in the original jurisdiction of the Supreme Court of South Carolina. Therefore, in fixing the costs, we feel that we are acting wisely in taxing at least half of the costs against the defendants jointly—it being immaterial to this Court as to the contribution as between the defendants themselves.

(820)

United States District Court
West. Dist. of So. Car.
JUN 18 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

ASSIGNMENT OF ERRORS.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,
vs.
Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, Members of and Constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Administrator of Public Works, Defendants.
} In Equity.

Duke Power Company and Southern Utilities Company, Plaintiffs in the above entitled action, file the fol-

lowing assignments of error upon which they will rely on their appeal, herewith applied for, from the decree of this Honorable Court entered in this cause on June 2, 1937:

I.

The Court erred in overruling plaintiffs' motion that the retrial of the cause be restricted to the issues raised by the supplemental pleadings filed pursuant to the mandate of the Supreme Court and relating to facts alleged to have supervened since the entry of the original decree of injunction in the cause, and in holding that de-
(821) fendants, under the mandate of the Supreme Court, were entitled to a rehearing of the original issues.

Mr. ROBINSON, Counsel for Plaintiffs: It is our position that the defendants here asked for the remand of this case on their motion, alleging that there had been a change in fact since the taking of the previous testimony and since the findings of the court, and it was upon that allegation of a supervening change that the case was sent back. The matter now before Your Honor is the question of the alleged supervening change in the facts since the decree, and the evidence now to be presented should relate to this subsequent change and not to the original issues.

The COURT: As I read the Supreme Court's decision it seems to contemplate that the case should be tried practically as a new case. Of course, there are some legal questions that will come up during the trial that I will have to rule on and on which I have an open mind and I want to hear arguments on both side of them.

Mr. ROBINSON: Of course, I don't want to discuss any matter about which Your Honor has a firm opinion.

The COURT: I am rather firm in the view Mr. Robinson that we ought to proceed to try the case in the normal way.

Mr. ROBINSON: In order to present the question plaintiffs desire to file the following motion:

"Plaintiffs move the Court to hold and rule:

1. That the mandate of the Supreme Court does not

require a rehearing of the issues raised by the original pleadings which were tried and determined by this Court prior to the entry of the original decree of injunction of August 26, 1935, or a review of the findings of this Court on said issues, except to the extent that this (822) Court should find that said original findings have been displaced or otherwise materially affected by facts which may have supervened since the entry of said original decree of injunction.

2. That the retrial of the cause be restricted to the issues raised by the supplemental pleadings filed by the parties since the receipt of the mandate of the Supreme Court and pursuant to said mandate, which issues relate to the alleged supervening facts since the entry of said original decree of injunction.

Respectfully submitted,

H. J. HAYNSWORTH,
R. T. JACKSON,
W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs."

The COURT: You may hand it up to me. The motion will be denied.

Mr. ROBINSON: Plaintiffs would like to take an exception.

The COURT: Objection and exception taken and allowed.

Mr. ROBINSON: Now if Your Honor please may I make this further statement that the plaintiffs in introducing their testimony do so subject to the position which they have taken in the motion. I do that because it is the position of the plaintiffs that no evidence bearing upon the original issues and which might have been introduced on the original hearing is now admissible, and of course by proceeding first as Your Honor has suggested we may appear to be waiving that position.

The COURT: I understand that you are not.

Mr. ROBINSON: Because in order to comply with (823) Your Honor's ruling we must put on any additional evidence which we have on the original issues.

The COURT: That is right.

II.

The Court erred in its conclusions of Law Nos. 1, 2, and 20 (b), holding that—

"The applicable provisions of Title II of the National Industrial Recovery Act and of the Emergency Relief Appropriation Act of 1935, and the contract and the loan and grant involved in this suit, are valid and constitutional"; that they "involve valid expenditures for the general welfare, and involve no improper delegation of legislative power and no exercise of any improper delegated power, and do not violate the Tenth Amendment or any other provisions of the Constitution."

In so holding the Court erred for that:

(a) Title II of the National Industrial Recovery Act (48 Stat. 200, *et seq.*), as applied to this case and as construed by the Court to authorize the grant and so-called loan of federal funds for the construction of the proposed local electric power plant, the contract involved herein and the action of the Administrator of Public Works, is not within any power delegated to Congress by the general welfare clause, U. S. Const., Art. I, Sec. 8, Cl. 1, or by any other clause or provision of the U. S. Constitution; and is violative of the Tenth Amendment to said Constitution, in that it invades powers and governs and controls matters reserved to the States.

(b) The statute, as so construed and applied, is not a lawful exercise of the power of Congress to expend public funds for the general welfare of the United States; and is not an appropriate and constitutional (824) means to which Congress may resort for the relief of unemployment.

(c) It deprives plaintiffs of their property without due process of law, in violation of the Fifth Amendment to the U. S. Constitution.

(d) It unlawfully delegates legislative power to the

Executive Department of the Government, in violation of Art. I, Sec. 1, of the U. S. Constitution, and of the other provisions of said Constitution which prohibit the delegation of legislative power to the Executive Department.

(e) The loan and grant and the contract involved herein were made under the asserted authority of Title II of the National Industrial Recovery Act. The Emergency Relief Appropriation Act of 1935 has no application to the case; it has not been set up or relied on by any of the parties to this suit in any of the proceedings herein; and, if applicable, is unconstitutional on the grounds above set forth in respect of the application of Title II of the National Industrial Recovery Act.

III.

The Court erred in its Conclusion of Law No. 3, holding that—

"Title II of the National Industrial Recovery Act sets forth definite standards with respect to the purposes of the expenditures by the Administrator and the means by which such expenditures should be made. These standards, as administratively interpreted, were reaffirmed by the Emergency Relief Act, Fiscal Year of 1935, approved June 19, 1934, and were also reaffirmed by and incorporated in Section 12 of the Emergency Relief Appropriation Act of 1935, approved April 8, 1935, and by the First Deficiency Appropriation Act of 1936, approved June 22, 1936."

(825) IV.

The Court erred in its Conclusion of Law No. 4 holding that—

"If the making of the loan and grant results in lower rates, such result is but the incidental effect of what the States and their municipalities voluntarily decide to do, and therefore cannot have the effect of making such loan and grant invalid;" the error being that:

The lowering of rates will not be the incidental effect of what the State of South Carolina and Greenwood County have voluntarily decided to do; but will be the direct result and the natural and inevitable effect of the making of said loan and grant.

V.

The Court erred in its conclusions of Law Nos. 6, 7 and 8, the error being that the plaintiffs' right to injunctive relief does not rest solely upon federal regulation of matters of intrastate concern, but also upon the right of any citizen whose property is proximately damaged by one purporting to act as an officer of the federal government to challenge the constitutional or other authority for the action of the federal officer or agent, and that the competition threatened in this case would not be lawful.

VI.

The Court erred in its Conclusion of Law No. 11 holding that, although originally it was the policy of the Administrator to exercise rather a large authority over the operation of the Greenwood County plant, yet there has been a complete change of the actual intent with respect to this control; that under the present contract Greenwood County and its governing authorities, in the operation and management of said plant, are subject to the regulatory bodies of South Carolina; and that the (826) only limitation on this freedom of South Carolina is that control which the Administrator will find necessary to protect his interest as a holder of the bonds, this interest being comparable to that which the owner of a County bond has to require, by way of receivership or mandamus, that taxes be assessed, collected and applied to the payment of the bonds; the error being that:

(a) The natural and inevitable effect of the making of said loan and grant for the construction of said proposed plant will be to lower intrastate electric power rates, and to carry out the policy of the Public Works Administration directed to that end; and the changes by the substitution of the present contract for the prior contract of December 8, 1934, are immaterial, leaving

the loan and grant and the proposed plant the same, as they originally were, in character, purpose and effect.

(b) The applicable Statute of the State of South Carolina expressly provides that the rates to be charged by said plant "shall not be subject to supervision or regulation by any State bureau, board, commission or other like instrumentality or agency" of the State.

(c) The said bonds will be payable solely from the revenues of the plant, and in order to get and hold the business necessary to pay the installments of principal and interest on said bonds it will be necessary for said plant to maintain rates substantially below the rates of plaintiffs.

VII.

The Court erred in its Conclusion of Law No. 12 holding that—

"The contract and the proposed loan and grant involved in this suit are made and being made in full compliance with the applicable statutes;" the error being that:

(827) (a) The provisions of Secs. 202 and 203 of Title II of the National Industrial Recovery Act, requiring the preparation of a comprehensive program of public works, have not been complied with.

(b) The so-called loan to Greenwood County is not reasonably secured as required by Sec. 203 of Title II of said Act.

(c) The proposed plant will not be a useful public work, but will be a wasteful duplication of the facilities of plaintiffs.

(d) The controlling factor in the making of said loan and grant by the Public Works Administration was the effect which it will have in reducing intrastate electric power rates and in the promotion of public ownership.

VIII.

The Court erred in its Conclusion of Law No. 13 holding that the administrative interpretation of the provisions of Title II of the National Industrial Recovery Act with reference to the preparation of a comprehensive program of public works under which interpretation individual projects were, from time to time, selected to be financed with federal funds, was a reasonable, practical and proper interpretation of said provisions, and that said interpretation had been adopted, ratified and approved by Congress.

IX.

The Court erred in its Conclusion of Law No. 14 holding that the acts in this case of the executive and administrative officials of the Public Works Administration were not unreasonable and were within the range of sound discretion and further erred in that thus to limit judicial review deprives the plaintiffs of the privilege of the full and judicial scrutiny of the facts, jurisdictional and otherwise, guaranteed by the due process clause of the Fifth Amendment and by Art. III, Secs. 1 and 2, of the Constitution.

(828)

X.

The Court erred in holding that the damage which plaintiffs will sustain in this case will result solely from lawful competition by Greenwood County, and that no legal right of plaintiffs will be invaded by the threatened acts of the defendants herein.

XI.

The Court erred in finding holding that plaintiffs will sustain no substantial injury in this case from the unlawful use of federal funds by the defendants herein in financing the construction of said plant.

XII.

The Court erred in holding that plaintiffs are not

entitled to the injunction prayed for or to any other relief in this action, and in dismissing the bill of complaint.

XIII.

The Court erred in its Finding of Fact No. X; the error being that the agents and representatives of P. W. A. handling applications for loans and grants for the construction of publicly owned power plants, competitive with private utilities, were authorized to negotiate and, with the knowledge and approval of the Administrator did negotiate, with private utilities for reductions in rates, giving them the opportunity to escape federally subsidized competition by reducing their rates to a level satisfactory to the PWA authorities.

(829) XIV.

The Court erred in making its Finding of Fact No. XI; the error being that the Greenwood County application was not handled in accordance with the procedure referred to in said finding, but said application was approved and the loan and grant made because the PWA authorities considered the rates of plaintiffs excessive.

XV.

The Court erred in making its Finding of Fact No. XII, as follows:

"The determination to engage in the electric generating and distribution business was made by the properly constituted authorities of Greenwood County of their own free will. There was no solicitation or coercion on the part of the defendant Ickes, his agents or subordinates. Any effect that the construction of the proposed County plant may have on plaintiffs' rates or business will be the result of (1) the voluntary construction of an electric project by the County, and (2) in voluntary decision of the County to use that plant in competition with plaintiffs;" the error being that:

(830) (a) The effect that the construction of the proposed plant will have on plaintiffs' rates and business will not be the result of the voluntary construction of the

plant by the County and the voluntary decision by the County to use the plant in competition with the plaintiffs, but will be the direct result of the making of said loan and grant and of financing the construction of said plant with federal funds.

(b) Greenwood County's application was filed in response to WPA's solicitation of applications for loans and grants for the construction of publicly owned utilities whose rates would serve as yardsticks to control and lower power rates, the application stating that the rates to be charged by the proposed plant would be only slightly above the TVA rates in Tupelo, Miss., and that they would furnish a yardstick of the cost of hydro-electric power in the territory where the plant will operate.

XVI.

The Court erred in making its Finding of Fact No. XVI; the error being that the loan will not be reasonably secured nor the plant self-liquidating.

XVII.

The Court erred in its Finding of Fact No. XVII, in finding—

"that the means used by Congress for relieving unemployment in so far as they affect this case, that is, the aiding of States and their subdivisions in the construction and financing of public works, are proper means of carrying out this national purpose of relieving unemployment;" the error being that the loan and grant in this case was not make for the relief of unemployment and that the finding is in effect a conclusion of law and as such is erroneous.

(831) XVIII.

The Court erred in making its Finding of Fact No. XVIII; the error being that the allotment of federal funds to Greenwood County was made and the contract with the County entered into so as to lower power rates;

this was the controlling factor in the making of said allotment and will be the natural and inevitable effect of said allotment.

XIX.

The Court erred in making its Finding of Fact No. XIX; the error being that it was not necessary for the Public Works Administration to examine into the rates of plaintiffs in order to carry out Congress' mandate that the loan be reasonably secured; and the examination into plaintiffs' rates was not made for that purpose.

XX.

The Court erred in making its Finding of Fact No. XX; the error being that the rates charged by the Greenwood County project will serve as a yardstick for and means of regulating other power rates and plaintiffs will be forced to reduce their rates or else will sustain substantial injury to their business.

XXI.

The Court erred in making its Finding of Fact No. XXI; the error being that plaintiffs will be forced to reduce their rates; unless their rates are reduced, plaintiffs will sustain an immediate and certain loss in Greenwood, Newberry and Laurens Counties, South Carolina, of approximately $250,000 annually, and in addition will sustain further and larger losses certain to occur but uncertain as to amount.

(832) XXII.

The Court erred in failing and refusing to find that plaintiffs are adequately serving the territory in which the proposed plant would operate; that the established and available facilities of plaintiffs are amply sufficient adequately to serve said territory for many years; that plaintiffs' business and their rates for the sale and distribution of electric power in South Carolina are subject to the exclusive jurisdiction and control of the Public Service Commission of that State; and that their rates have been approved by said Commission.

XXIII.

The Court erred in failing and refusing to find that the proposed plant will be a purely local and intrastate enterprise, and that it will be an unnecessary and wasteful duplication of plaintiffs' facilities.

XXIV.

The Court erred in failing and refusing to find as follows:

"The Federal Emergency Administration of Public Works in determining whether to approve or to disapprove an application for a loan and grant of federal funds for the construction of a municipal power plant, such as the proposed Buzzard Roost plant, adopted and applied the criterion that no such application would be approved unless the rates of the proposed plant would be materially lower than the rates of the privately-owned utility with which the proposed plant would compete. Accordingly where the privately-owned utility agreed to (833) put in effect rates at least as low as the rates of the proposed municipal plant the application was not approved. This criterion was adopted and applied by the Federal Emergency Administration of Public Works pursuant to its announced power policy to bring about the reduction of electric power rates so as to make electric energy more widely available at cheaper rates. The effect of this policy was to constitute the rates of the proposed municipal plant a standard or yardstick by which to measure, regulate and control electric power rates and to bring about reductions in such rates."

XXV.

The Court erred in failing and refusing to find as follows:

"The application filed with the Federal Emergency Administration of Public Works on November 16, 1933, stated that the rates of the proposed Buzzard Roost plant were only slightly above the Tennessee Valley Authority rates which would be applied in Tupelo, Miss., and that

the proposed plant would establish, in the territory in which it would operate, an economic electric service similar to that set up by the Tennessee Valley Authority and would furnish a proper and fair yardstick and measure of the cost of hydro-electric power. On the application being filed the rates of plaintiffs, with which the proposed plant would compete, were investigated by the Federal Emergency Administration of Public Works, and the conclusion was reached that plaintiffs' rates were (834) excessive. The rates of the proposed plant, being materially lower than plaintiffs' rates, the application met the required test of the Public Works Administration, and was accordingly approved pursuant to the policy of said Administration to approve applications for such plants as would be effective in bringing reductions in power rates in the localities in which such plants would be operated."

XXVI.

The Court erred in failing and refusing to find as follows:

"The rates at which the proposed plant would sell electric power and energy being materially lower than the rates of plaintiffs, the County, because of said lower rates, has been able to enter into contracts for the sale of a large part of the electric power and energy which would be produced by the proposed plant to consumers of power who are now, and for a number of years have been, customers of the plaintiffs. If the project should be constructed and put into operation the plaintiffs will be deprived of their customers in the territory in which the project would operate, and the property and business of plaintiffs will be seriously and permanently injured."

XXVII.

The Court erred in failing and refusing to find as follows:

"The terms and conditions of the loan and grant, as approved by the Federal Emergency Administration of Public Works, were first set forth in detail in a con-

(835) tract which the County entered into with the Administrator of Public Works on December 8, 1934. This contract was superseded by a new contract dated November 30, 1935. This new contract made no change in the character, scope or purpose of the project, in the nature of the business in which it would engage, in the territory in which it would operate in the event of its construction or in the necessary and inevitable effect on plaintiffs' rates. The new contract was not based on any new application by the County to the Federal Emergency Administration of Public Works, but was entered into pursuant to the original application and to the resolutions of the Federal Emergency Administration of Public Works dated June 20, 1934, and November 7, 1934, approving said application. Under the new contract the same amount of federal funds would be advanced by the Administrator of Public Works by way of loan and grant, on terms and conditions whereby the County would make no investigation of its own funds for the construction of the project, and would incur no liability and assume no obligation either for its construction or for its operation."

XXVIII.

The Court erred in failing and refusing to find as follows:

"If said plant is constructed as proposed, the plaintiffs, in order to avoid the loss of their business and the consequent injury to their property, will be forced to (836) make material reductions in their rates so as to meet the competition of the lower rates of said plant; and the direct, necessary and inevitable effect of said loan and grant for the construction of said plant will be to regulate and control the intrastate electric rates of the plaintiffs, not only in the territory in which said plant would operate, but throughout the entire territory in which plaintiffs do business."

XXIX.

The Court erred in failing and refusing to find as follows:

"The proposed plant would not and could not be

constructed and operated at rates lower than those of plaintiffs except for said loan and grant of federal funds, and the injury to the business and property of the plaintiffs and the loss and damage which they would sustain would be directly caused and brought about by said loan and grant of federal funds."

XXX.

The Court erred in overruling objections by plaintiffs to the following line of questions put by counsel for defendants to the defendant, Harold L. Ickes, upon direct examination, and in admitting in evidence over the objection and exception of plaintiffs the testimony of said defendant in response to said questions, to-wit:

Q. Were your intentions and purposes under the former contract with Greenwood County—contract of December 8, 1934—in any way substantially different from what you have just indicated? (The witness having indicated that he had no interest in plaintiffs' rates except his interest as a holder of the special revenue (837) bonds of the County.) A. None at all.

Q. I call your attention to Senate Document 169, 73rd Congress, second session, or a copy of the same, being entitled "Letter from the Administrator of Public Works pursuant to Senate Document No. 190, A report of business of the Federal Emergency Administrator of Public Works for the period ending February 15, 1934". Such letter being dated March 22, 1934. And ask you to turn on page 9 of that report headed "Part III Policy of the Public Works Administration". The first sentence reads: "The fundamental purpose of the Public Works Administration is to relieve unemployment and increase purchasing power through the construction of useful public works, thereby increasing the production of goods and also providing employment in the capital goods industry." Is that a correct statement of the policy of the Public Works Administration? A. It is.

Q. On the question as to the merits of the projects of that type in the general category in which the Greenwood County project stands, did you, or do you, weigh any consideration other than those involved in other types of applications? A. No, we consider them all on

the same basis and applied the same principles on all of them regardless of the project.

(838) Q. To what extent, if at all, were you interested in the question of comparative rates to be charged by a proposed public utility to be operated by the municipality, as compared with the rates charged by private existing companies with which the city or municipally-owned project would have to compete, where the bonds were revenue bonds. A. Well, our interest in revenue bonds was whether or not—our interest in the matter of rates with reference to projects, where we took revenue bonds, simply went to the question of whether or not the rates to be charged would pay our loan within the time limited in the contract.

Q. In connection with the application of Greenwood County, did you take into account other considerations —considerations other than those to which you have heretofore referred? A. No.

Q. Did he (Mr. Rose who testified as a witness for the Federal Emergency Administration of Public Works on the original hearing) have any authority to speak for the Public Works Administration with respect to questions of policy? A. He was not authorized to speak for the Public Works Administration with respect to anything, policy included.

Q. Have you read the testimony given by Mr. Rose in this case? A. Yes, I have.

Q. Have you any comments to make with respect to it? A. Well, I think he was suffering from delusions of grandeur. He had no authority to expound, or determine, or say what the policy of the Public Works Administration was, and he certainly undertook to do that in large measures.

(839) Q. Was his testimony with respect to the rates of Greenwood County or the plaintiffs in this case, a correct statement of the policy, intentions, or purposes of the Public Works Administration? A. No, it was not. He may have been right on his figures on rates, which I am not competent to testify in respect to, but on policy he was not correct.

Q. Was his testimony with respect to the policy of the Public Works Administration concerning rates, so far as it differs from your previous testimony as to the policy of the Public Works Administration, correct? A. No.

Q. I call your attention to Plaintiffs' Exhibit #35 in this case, or to a copy of the same, a press release dated September 24th, 1934, of the Federal Emergency Administration of Public Works, and have handed you the same. Are you familiar with the terms of that press release? A. I am.

Q. Does it correctly set forth your policy in passing on applications for competitive electric power projects? A. Not standing alone.

Q. Insofar as it differs from your policy as stated in your testimony given today, which would be the more accurate; your testimony or that press release? A. The testimony I am giving today more accurately reflects the policy of the Public Works Administration.

Q. Then at the time of the issuance of that press release? A. It does.

(840) To each of the foregoing questions plaintiffs duly objected, on the grounds that the question did not relate to any change supervening since the original hearing and the entry of the original decree in this case; but relates to matters heard and determined on the original hearing of the case, and is irrelevant and immaterial to any matter properly before the Court on the retrial; each of the objections was overruled by the Court; and to each of said rulings an exception was duly taken by plaintiffs and allowed by the Court.

XXXI.

The Court erred in overruling the objections by plaintiffs to the following questions put by counsel for defendants to the defendant, Harold L. Ickes, on re-direct examination, and in admitting in evidence over the objection and exception of plaintiffs the testimony of said defendant in response to said questions, to-wit:

Q. In the case of the Greenwood County project, you would have made the loan and grant, regardless of your views as to whether the Duke Power Company's rates were, or were not high?

Objection by plaintiffs on the grounds stated above in Assignment No. XXX, and on the additional ground that the question calls for a conjectural conclusion by

the witness, and that the question is irrelevant and immaterial.

The Court overruled the objection and an exception was taken by plaintiffs and allowed by the Court.

A. We would have made the loan and grant to Greenwood County, regardless of the rates, or our opinion of the rates, of the Duke Power Company, if Greenwood County had the legal authority to enter into the contract with us, and if Greenwood County could satisfy us that it could liquidate the loan that we made.

Q. Those were the considerations?

Objection by plaintiffs on the grounds stated above.

COURT: Objection overruled. Exception taken by plaintiffs and allowed by the Court.

A. They were.

XXXII.

The Court erred in admitting in evidence on behalf of defendants, over the objection and exception of plaintiffs, defendants' Exhibit No. 70, a document, to-wit, "Letter from the Administrator of Public Works transmitting pursuant to Senate Resolution 190 a report of the business of the Federal Emergency Administrator of Public Works for the period ending February 15, 1934", which letter with the report attached was addressed to the Senate of the United States and was dated March 22, 1934.

The report purports to state the policies of the Public Works Administration as follows:

"The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works, thereby increasing the consumption of goods and also providing employment in the capital goods industries."

Counsel for plaintiffs objected to the introduction of the document on the grounds that it is hearsay and

a self-serving declaration, and that it does not relate to any change supervening since the entry of the original (841) decree and if admissible at all, was admissible on the original hearing.

Counsel for defendants stated that the document was offered as admissible on its own weight and as a public document representing the policy of the Public Works Administration.

The objection was overruled by the Court and an exception was taken by the plaintiffs and allowed by the Court.

Wherefore, plaintiffs pray that said decree be reversed and for such other and further relief as may be just and appropriate in the premises.

H. J. HAYNSWORTH,
R. T. JACKSON,
W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Duke Power Company and Southern Public Utilities Company, Plaintiffs.

18th June, 1937.

PRAECIPE.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
(842) WESTERN DISTRICT OF SOUTH CAROLINA.
IN EQUITY.

United States District Court
West. Dist. of So. Car.
JUL 1 1937
FILED
.....A. M. ..... P. M.
W. D. WHITE, Clerk.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and Harold L. Ickes as Federal Emergency Administrator of Public Works, Defendants.

It Is Agreed That the transcript of record to be certified on appeal to the United States Circuit Court of Appeals, for the Fourth Circuit, in the above-entitled cause, shall consist of the following:

1. The Bill of Complaint, with all of the exhibits which are attached hereto, with the exception of Exhibit III, and in lieu of Exhibit III there shall be inserted at the place where this exhibit would have been inserted the following statement:

Exhibit III attached to the complaint was the opinion of the South Carolina Supreme Court in the case of *Park* vs. *Greenwood,* which will be found reported in 174 S. C. 35, 176 S. E. 870, and except immaterial portions of Exhibit I, which by agreement between counsel are to be omitted in printing.

2. Subpoena in Equity showing service upon the defendants.

3. The Order making Harold L. Ickes a party de-
(843) fendant to the suit.

4. The Answer of Harold L. Ickes filed January 17, 1935, together with Exhibit "A" attached thereto Exhibit "A" being a copy of the Loan and Grant Agreement between Harold L. Ickes and Greenwood County, executed as of December 8, 1934.

5. The Answer of Greenwood County and its Finance Board, filed January 17, 1935, together with the Resolution of Greenwood County's Finance Board attached to that Answer.

6. Amended and Supplemental Bill of Complaint, filed February 4, 1935, except that Exhibit XII attached thereto is to be omitted in printing, this being incorporated herein as plaintiffs' Exhibit 35.

7. Motion of Greenwood County to dismiss the Amended and Supplemental Bill of Complaint, filed February 23, 1935.

8. The Motion of Harold L. Ickes to dismiss the Amended and Supplemental Bill of Complaint, filed April 9, 1935.

9. The Opinion of the Hon. H. H. Watkins of April 23, 1935.

10. The Order of the Hon. H. H. Watkins, refusing the Motion to Dismiss and referring the matter to W. M. Walters, Special Referee, dated April 29, 1935.

11. The Answer of Greenwood County to the Amended and Supplemental Complaint.

12. The Answer of Harold L. Ickes, dated February 12, 1935, to the Amended and Supplemental Complaint.

13. Statement of the Oral Evidence and Exhibits used on the trial before the Court sitting in Equity on July 19, 1935, which statement of evidence and exhibits was agreed to by counsel for the respective parties to the suit on September 27, 1935, and approved by His Honor, Judge Watkins, October 1, 1935.

(844) 14. The Statement of the motion of the defendants to strike out certain testimony made on July 19, 1935.

15. The opinion of the Hon. H. H. Watkins of August 10, 1935.

16. Decree for injunction filed August 26, 1935.

17. Assignments of Error filed on behalf of the defendants August 26, 1935.

18. The motion of Harold L. Ickes, Federal Emergency Administrator of Public Works, made before the Circuit Court of Appeals on December 5, 1935, with the contract of November 30, 1935.

19. Mandate of the Circuit Court of Appeals to the United States District Court, including the Order of the Circuit Court of Appeals of December 5, 1935.

20. Opinion of the Honorable H. H. Watkins of December 21, 1935.

21. Decree of Judge Watkins filed December 21, 1935.

22. Assignments of Error filed by the defendants, Greenwood County and its Finance Board, December 31, 1935.

23. Assignments of Error filed by the defendants, Harold L. Ickes, Federal Emergency Administrator of Public Works, December 31, 1935.

24. Amended Assignments of Error filed by Greenwood County and its Finance Board, January 17, 1936, as of Dec. 31, 1935.

25. Amended Assignments of Error filed by Harold L. Ickes, Federal Emergency Administrator of Public Works, January 17, 1936, as of Dec. 31, 1935.

26. Mandate of the United States Supreme Court of January 9, 1937, with the opinion of said Court referred to in said Mandate.

(845) 27. The order of Hon. J. Lyles Glenn entered pursuant to the mandate of the United States Supreme Court of January 19, 1937.

28. The supplemental answer of the defendant Greenwood County and E. L. Brooks, S. A. Agnew and

E. I. Davis, as members of and constituting The Finance Board for Greenwood County, omitting the contract of November 30, 1935, attached to said answer.

29. The supplemental answer of Harold L. Ickes as Federal Emergency Administrator of Public Works.

30. The plaintiffs' reply to the supplemental answers of the defendants.

31. The order of Hon. J. Lyles Glenn entered February 1, 1937, granting a preliminary injunction.

32. Statement of evidence under Rule 75, approved by Judge Glenn, July 1st, 1937.

33. Order for transmission of original exhibits.

34. Opinion of Hon. J. Lyles Glenn, together with findings of fact and conclusions of law entered June 2, 1937.

35. Decree of Hon. J. Lyles Glenn entered June 2, 1937.

36. Assignment of Errors by plaintiffs.

37. This *Praecipe* and Agreement as to transcript.

38. Clerk's Memoranda of the filing of petition for appeal, order allowing appeal, citation, appeal bond, acceptance of service of petition for appeal, order allowing appeal, and of citation, etc., in plaintiffs' appeal and also in the appeals of the defendants.

39. Stipulation that the record shall be printed under the supervision of the Clerk of the United States Circuit Court of Appeals, for the Fourth Circuit, in accordance with Rule 23 of that Court.

(846) 40. Assignments of error by defendants.

41. Clerk's Certificate.

This agreement as to the transcript shall be filed with the Clerk of the U. S. District Court, for the Western District of South Carolina, in lieu of *Praecipes* by the respective parties.

This July 1st, 1937.

W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs, Appellants.

RUPERT A. DAVIS,
W. H. NICHOLSON,
D. W. ROBINSON, JR.,
Attorneys for Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, Defendants, Appellees.

ROBERT E. SHER,
Attorney for Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendant, Appellee.

(847) **MEMORANDUM.**

(1) Petition for Appeal filed by Duke Power Company and Southern Public Utilities Company on June 18, 1937;

(2) Appeal of Duke Power Company and Southern Public Utilities Company allowed June 19, 1937;

(3) Copy of this Order Allowing Appeal lodged for adverse party, Greenwood County, etc., on June 24, 1937,

and lodged for adverse party, Harold L. Ickes, etc., on June 24, 1937;

(4) Appeal Bond: Duke Power Company and Southern Public Utilities Company.
Dated: June 21, 1937.
Penalty $500.00.
Obligors: Duke Power Company and Southern Public Utilities Company, as Principals.
Maryland Casualty Company, a Corporation of the State of Maryland, Baltimore, Maryland.
Conditioned for damages and costs.

(5) Citation—Dated: June 19, 1937; Acceptance of Service by Counsel for Greenwood County dated June 19, 1937. Acceptance of Service by Counsel for Harold L. Ickes dated June 22, 1937.

(1) Petition for Appeal filed by Harold L. Ickes, as Ickes, as Federal Emergency Administrator of Public Works, on July 1, 1937;

(2) Appeal of Harold L. Ickes, etc., allowed July 1, 1937;

(3) Copy of Order Allowing Appeal of Harold L. Ickes, etc., lodged for adverse party, Duke Power Company and Southern Public Utilities Company on July 1, 1937;

(4) Citation, dated July 1, 1937. Acceptance of Service dated July 1, 1937;

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(1) Petition for Appeal filed by Greenwood County etc., on June 19, 1937;

(2) Appeal of Greenwood County, etc., allowed June 19, 1937;

(3) Copy of Order Allowing Appeal of Greenwood County, etc., lodged for adverse party, Duke Power Com-

pany and Southern Pub. Utilities Co., June 21, 1937.

(4) Appeal Bond: Dated July 3, 1937.
Penalty $500.00.
Obligors: The County of Greenwood, by its Finance Board as Principal.
American Surety Company of New York, as Surety; Conditioned for costs.

(5) Citation, dated June 19, 1937. Acceptance of Service dated June 19, 1937.

(848) **STIPULATION FOR PRINTING OF RECORD UNDER RULE 23 OF THE UNITED STATES CIRCUIT COURT OF APPEALS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.
IN EQUITY.

United States District Court
West. Dist. of So. Car.
JUL 1, 1937
FILED
.....A. M. ●....P. M.
W. D. WHITE, Clerk.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,
vs.
Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

IT IS HEREBY STIPULATED AND AGREED that the Clerk of this Court shall make up a transcript of the record in the above-entitled cause and transmit the same to the Clerk of the United States Circuit Court of Appeals, for the Fourth Circuit, at Richmond, Va.; that said record be printed under the supervision of the Clerk

of that Court in accordance with Rule 23; and that the parties be governed by the terms of said rule.

W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Plaintiffs, Appellants.

RUPERT A. DAVIS,
W. H. NICHOLSON,
D. W. ROBINSON, JR.,
Attorneys for Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, Defendants, Appellees.

ROBERT E. SHER,
Attorney for Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendant, Appellee.

(849) **ASSIGNMENT OF ERRORS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

United States District Court
West. Dist. of So. Car.
JUL 1, 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,
vs.
Greenwood County and E. L. Brooks, S. A. Agnes and E. I. Davis, as members of and constituting The Finance Board for Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

On this the 1st day of July, 1937, comes the defendant Harold L. Ickes, as Federal Emergency Administrator of Public Works, and says that the Decree entered in the above cause on the 2nd day of June, 1937, is erroneous and unjust as to the defendants:

1. Because the Decree provides that the costs should be divided equally between the plaintiffs and the defendants, the error being that under the law and the facts in this case the Court should have awarded the costs against the plaintiffs.

2. Because in any event the delay cannot be chargeable to defendant Ickes because said defendant was not a party in the case of *Park* vs. *Greenwood County*, 174 S. C. 35, 176 S. E. 870, and therefore could not and did not resist plaintiffs' petition for intervention.

WHEREFORE, this defendant prays that the Decree be reversed and that the Circuit Court of Appeals shall render a proper decree on the record.

JAMES W. MORRIS,
Assistant Attorney General.

ENOCH E. ELLISON,
Attorney, Department of Justice.

JEROME N. FRANK,
ROBERT E. SHER,
WILLIAM J. DEMPSEY,
Counsel.
Attorneys for Harold L. Ickes.

Service accepted July 1, 1937.

W. B. McGUIRE, JR.,
Atty. Plaintiffs.

(850) **ASSIGNMENT OF ERRORS.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF SOUTH CAROLINA.

United States District Court
West. Dist. of So. Car.
JUN 19 1937
FILED
.....A. M. .....P. M.
W. D. WHITE, Clerk.

Duke Power Company and Southern Public Utilities Company, Plaintiffs,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, as members of and constituting the Finance Board for Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Defendants.

On this the 19th day of June, 1937, came the defendants, Greenwood County, and E. L. Brooks, S. A. Agnew, and E. I. Davis, as members of and constituting The Finance Board of Greenwood County, by their Solicitors, Rupert F. Davis, W. H. Nicholson, of Greenwood, S. C., and D. W. Robinson, Jr., of Columbia, S. C., and say that the Decree entered in the above cause on the 2nd day of June, 1937, is erroneous and unjust to the defendants:

1. Because the Decree provides that the costs should be divided equally between the plaintiffs and the defendants, the error being that under the law and the facts in this case the Court should have awarded the costs against the plaintiffs.

WHEREFORE these defendants pray that the Decree be reversed and that the Circuit Court of Appeals shall render a proper decree on the record.

(851)

W. H. NICHOLSON,
RUPERT F. DAVIS,
D. W. ROBINSON, JR.,
Attorneys for Greenwood County and its Finance Board.

June 19th, 1937.

(852) **CERTIFICATE OF CLERK.**

DISTRICT COURT OF THE UNITED STATES OF AMERICA.
WESTERN DISTRICT OF SOUTH CAROLINA.

I, W. D. WHITE, Clerk of the District Court of the United States for the Western District of South Carolina, do hereby certify that the writings annexed to this certificate, composed of Eight Hundred and Fifty-one pages, being the Transcript of the Record of all proceedings as agreed upon by counsel in the case of Duke Power Company and Southern Public Utilities Company, Appellants and Cross-Appellees, *versus* Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, Members of and Constituting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Appellees and Cross-Appellants, Docket No. E/451 (The Original of the writings appearing on pages 492 through 513, both inclusive, are not on file in this office) have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In Testimony Whereof, I have hereunto subscribed my name and affixed the Seal of the said Court at the City of Greenville, in the Western District of South Carolina, this tenth day of July, in the year of our Lord One Thousand Nine Hundred and Thirty-seven, and of the Independence of the said United States the One Hundred and Sixty-second.

(Seal) W. D. WHITE, Clerk.

(853) **SUPPLEMENTAL ASSIGNMENT OF ERROR AND ORDER FILING SAME.**

Filed July 13, 1937.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Duke Power Company and Southern Public Utilities Company, Appellants,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew, and E. I. Davis, Members of and constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Administrator of Public Works, Appellees.

SUPPLEMENTAL ASSIGNMENT OF ERRORS.

Duke Power Company and Southern Public Utilities Company, appellants, file the following Supplemental Assignments of Error upon which, in addition to the assignments of error heretofore filed, they will rely on their appeal heretofore allowed by this Court from the decree of the District Court of the United States, for the Western District of South Carolina, entered on June 2, 1937.

XXXIII.

The Court erred in striking out, on motion of defendants and over the objection and exception of plaintiffs, the engineering testimony offered by plaintiffs tending to show the cost of the construction of the project and that the revenue bonds proposed to be accepted by the Administrator would not be reasonably secured.

XXXIV.

The Court erred in admitting in evidence on behalf of defendants, over the objection and exception of plaintiffs, as defendants' Exhibit 80, a letter from Harold L. Ickes, Administrator of Public Works, to the City of Couer d'Alene, Idaho, dated March 16, 1936.

Plaintiffs objected to the introduction of the letter upon the grounds that it is hearsay; is a self-serving declaration; and was written after the litigation had arisen in the Couer d'Alene case as well as after the litigation in the case at bar.

The objection was overruled and an exception taken by plaintiffs and allowed by the Court.

H. J. HAYNSWORTH,
R. T. JACKSON,
W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
(854) Attorneys for Duke Power Company and Southern Public Utilities Company, Appellants.

The filing of the foregoing Supplemental Assignment of Errors by appellants is allowed.

This July 13th, 1937.

JOHN J. PARKER,
Senior Circuit Judge.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

(833)

No. 4209.

Duke Power Company and Southern Public Utilities Company, Appellants and Cross-Appellees,

versus

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, Members of and Constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Appellees and Cross-Appellants.

CROSS-APPEALS from the District Court of the United States for the Western District of South Carolina, at Greenville. In Equity.

June 19, 1937, the cause is docketed on the original appeal papers.

PETITION OF APPELLANTS FOR A STAY OF PROCEEDINGS PENDING APPEAL.

Filed June 19, 1937.

(Style of Court and Title Omitted.)

Your petitioners, appellants in the above entitled case, respectfully show:

I.

This case is pending in this Court on the appeal of appellants from a final decree made and entered by the United States District Court, for the Western District of South Carolina, on June 2, 1937, denying plaintiffs the injunctive relief sought by their bill of complaint herein and dismissing the bill on its merits.

II.

The plaintiffs by their bill of complaint, as amended and supplemented, seek an injunction to restrain the Federal Emergency Administrator of Public Works from making advancements of federal funds, by way of a loan and grant to be made under the asserted authority of Title II of the National Industrial Recovery Act, to (834) Greenwood County and its governing authorities for the construction of a municipally owned power plant in Greenwood County, South Carolina, and to restrain the County and its governing authorities from receiving and using said federal funds in the construction and operation of said plant.

III.

The plaintiffs are electric utility corporations doing business in the State of South Carolina. Their business and rates are subject to the jurisdiction and control of the Public Service Commission of that State. If said federal funds are advanced by the Public Works Administrator to said County said plant will be constructed and operated in competition with plaintiffs to their serious and irreparable injury and damage. The immediate and direct damage from said loan and grant which plaintiffs will sustain from loss of business in the three Counties of Greenwood, Newberry and Laurens, South Carolina, alone, will amount to approximately $250,000 annually.

IV.

The suit was instituted in the Court below on November 7, 1934. Greenwood County and the members of its Finance Board were named as the original defendants. Harold L. Ickes as Federal Administrator of

Public Works intervened, and was permitted to become a party defendant on December 4, 1934.

The defendants moved that the bill of complaint as amended and supplemented be dismissed. The motion was denied by the District Court on April 19, 1935, for the reasons set out in the opinion of the Court, 10 Fed. Supp. 854.

The defendants were then permitted to file answers and, after hearing the case on its merits, the District Court on August 26, 1935 entered its final decree granting an injunction in favor of plaintiffs, 12 Fed. Supp. 71.

The defendants appealed to this Court from said decree. While the appeal was pending the defendants entered into a new loan and grant agreement dated November 30, 1935, in place of the original loan and grant agreement dated December 8, 1934. The new agreement (835) was called to the attention of this Court and made the basis of a motion that the case be remanded to the District Court. The motion was granted by this Court and the case accordingly remanded to the District Court, 79 Fed. (2d) 995.

Additional evidence was then taken in the District Court and after a hearing a second decree was entered by the District Court on December 21, 1935, refusing to set aside and vacate the original decree of injunction. From this second decree defendants again appealed to this Court. Upon the appeal being heard the decree of the District Court was reversed and the bill ordered to be dismissed, 81 Fed. (2d) 986.

On Petition of plaintiffs the U. S. Supreme Court granted a writ of certiorari May 8, 1936 (298 U. S. 651), and thereafter on December 14, 1936, without ruling on the merits, remanded the cause to the District Court with directions to vacate the decrees theretofore entered by that Court, to permit the parties to amend their pleadings in view of the alleged supervening change in the facts, and to re-try the case on the issues thus presented.

The District Court, by its order of January 19, 1937, vacated the decrees of August 26, 1935 and December 21, 1935 pursuant to the mandate of the Supreme Court. On February 1, 1937 the District Court, on motion of plaintiffs, granted a preliminary injunction restraining the defendants from proceeding in the premises dur-

ing the pendency of the suit and until the further order of the Court.

On February 23, 1937 the case came before the District Court for hearing on its merits. Additional evidence was introduced and after hearing the case the Court made findings of fact, stated conclusions of law, rendered an elaborate opinion, and entered its decree in favor of defendants, as hereinbefore alleged, and it is on plaintiff's appeal from this decree that the case is now pending before this Court.

V.

The nature of the case and the importance of the (836) questions involved therein will appear from the proceedings heretofore had in the case.

VI.

Appellants intend to prosecute the appeal with all possible dispatch, and, for the reasons hereinafter stated, they intend, unless this Honorable Court should suggest otherwise, to apply to the U. S. Supreme Court for a writ of certiorari as soon as a certified transcript of the record is docketed in this Court. In the meantime the appellees, unless restrained by this Honorable Court, intend, to the irreparable loss and damage of appellants, to proceed with the construction of said proposed plant by means of federal funds to be advanced by the Administrator to the County and its governing officials. This action of the appellees will in all probability, at least for all practical purposes render the suit moot. It would seriously hinder and embarrass, if not altogether frustrate, the further proceedings in the case and, would forestall and render of no effect any action which this Court of the U. S. Supreme Court might take after hearing the case.

VII.

That the status quo should be preserved is shown by the fact that the U. S. Supreme Court heretofore granted a writ of certiorari to review the former decision of this Court in the case. On the writ then granted the Supreme Court did not consider the merits of the case due to the

view which it took of the procedural questions presented by the record. The granting of the writ, however, was a determination by the U. S. Supreme Court that the case is of such importance as to warrant its review by that Court. In addition the Supreme Court on June 1, 1937 granted writs of certiorari to review three similar cases passed upon by the Court of Appeals for the District of Columbia, in which decrees refusing to enjoin the Administrator of Public Works from making similar advancements of federal funds had been entered. These cases are now pending before the U. S. Supreme Court and will be heard at the Fall Term 1937. In (837) each of the cases stay orders are in effect preventing any advancement of federal funds by the Public Works Administrator pending the determination of the cases by the U. S. Supreme Court. Unless this Honorable Court suggests otherwise, it is the intention of appellants to apply to the U. S. Supreme Court for a writ of certiorari to the end that this case may be heard by that Court along with the similar cases now pending before it.

VIII.

Appellants have been unable to apply to the U. S. District Judge who heard this case in the District Court and entered the decree appealed from for the restoration and continuance of the preliminary injunction granted by that Court because of the illness of the Judge rendering him unable to consider and pass upon the application.

WHEREFORE, petitioners pray this Honorable Court to restrain defendants from advancing, receiving or using federal funds for the construction of said project during the pendency of this appeal, to the end that the status quo may be preserved in the meantime, and for such other relief as may be appropriate in the premises,

H. J. HAYNSWORTH,
R. T. JACKSON,
W. B. McGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Petitioners,
Appellants.

UNITED STATES OF AMERICA,
Western District of North Carolina,
County of Mecklenburg.

N. A. Cocke, being first duly sworn, deposes and says that he is an Officer of Duke Power Company, to-wit, the Vice President of said Company, one of the petitioners in the foregoing petition; that he has read said petition and knows the contents thereof, and that the statements contained therein are true to the best of his knowledge, (838) information and belief.

N. A. COCKE.

Sworn to and subscribed before me, this the 18th day of June, 1937.

(Seal of Notary)

JAS. S. SEASE,
Notary Public,
Mecklenburg County, N. C.

My Commission Expires June 18, 1939.

RETURN OF APPELLEES GREENWOOD COUNTY AND ITS FINANCE BOARD TO PETITION OF APPELLANTS FOR STAY OF PROCEEDINGS.

Filed June 19, 1937.

(Style of Court and Title Omitted.)

The Respondents, Greenwood County and its Finance Board, by way of return to the petition of the Plaintiffs for an order of supersedeas, would respectfully show to this Court:

1. That this Bill in Equity was instituted in the United States District Court for the Western District of South Carolina November 7, 1934. After the Bill had been amended and supplemented (Feb. 4, 1935) the defendants' motion to dismiss was refused by the District Court on April 23, 1935 (10 F. Supp. 854). Thereafter testimony was taken and the District Court on August 26, 1935, granted a decree of injunction against the de-

fendants (12 F. Supp. 71). This injunction decree remained in force and effect until the reversal by this Court of the decree of the District Court on February 22, 1936 (81 F. (2d) 986), and thereafter remained in force by reason of the stay order of this Court issued March 17, 1936 until vacated by the United States District Court January 19, 1937.

Certiorari to this Court was granted by the United States Supreme Court on the petition of the Duke Power Company May 18, 1936 (298 U. S. 651) and thereafter by that Court remanded to the United States District Court with directions to vacate the injunction order (81 L. Ed. 149).

After vacating the injunction order, on the 19th of January 1937, the United States District Court granted a temporary restraining order February 1, 1937. Thereafter the case was heard on its merits and the United (839) States District Court by its decree of June 1, 1937 denied injunctive relief, vacated the interlocutory injunction of February 1, 1937 and ordered the Bill dismissed.

2. It will be seen from the foregoing history of the case that the defendants have been actually enjoined from proceeding with the development of the Saluda River hydro-electric plant from August 26, 1935 until January 19, 1937, and from February 1, 1937 until June 1, 1937, and that during a portion of the period prior to the issuance of the District Court's injunction of August 26, 1935, it was apparent that the District Court, because of the reasoning in its opinion overruling the motion to dismiss, would grant an injunction when the testimony was before it. For all practical purposes, therefore, these defendants have been effectively restrained practically since the institution of the suit from doing any substantial work on the Buzzard Roost project.

3. In the testimony taken before the Honorable J. Lyles Glenn, District Judge, at Rock Hill in February, 1937, when this case was heard on the merits, it appears that the Duke Power Company, while the injunction was in force against Greenwood County, in October, 1936, authorized the building of a third steam unit for the development of power at Duke's River Bend plant near Charlotte, N. C., which plant is expected to be com-

pleted in the early part of 1938, and which plant, if it is run constantly, would develop about four times as much power as Greenwood County's Saluda River plant.

On information, advice and belief, the County avers that the development of this River Bend unit will place Duke in a better competitive position with Greenwood County and that it is inequitable to restrain the County from the development of its plant while Duke continues the development of the steam unit at River Bend.

4. That as shown in Title II of the National Industrial Recovery Act of 1933, Congress' purpose in ap-
(840) propriating the funds, a portion of which have been allotted to Greenwood County for the development of this project, was to increase employment quickly. This purpose has been found by the District Court and by this Court to be a proper national purpose and the actual purpose of Congress in enacting this law. These respondents would respectfully urge upon the Court the fact that since this Act was made law in May, 1933, some four years have elapsed and it is entirely possible that if the expenditure of this money is longer delayed, the National Congress or the Administrator of Public Works may decide that these funds cannot longer be held for the Greenwood County project and transfer the allotment to some project which would spend the money for the relief of unemployment quickly.

5. That since the institution of this Bill in November, 1934, Greenwood County has been forced, by reason of the injunction set out above, to take the chance of its allocation being revoked by the outcome of political campaigns in which the Chief Executive and a large portion of Congress were elected.

These respondents would also show to the Court that from the current discussions in Congress and in the Press there appears to be a substantial group in Congress who feel that Federal expenditures of the type involved in this litigation should be substantially curtailed in an effort to balance the budget and these respondents feel that if they are restrained by this Court from obtaining Federal funds their chances of completing the project will be substantially jeopardized, even though the litigation is eventually successful.

6. These respondents direct the Court's attention to the findings by the District Court to the effect that the Greenwood County project will produce comparatively such a small amount of power that it will not substantially effect the Duke Power Company. If the project is completed the chances of damage to Duke Power Company are substantially less than the chance Greenwood County is incurring by reason of the political un-
(841) certainties and other uncertainties which further delay would emphasize.

In this connection the County calls particular attention to the 21st finding of fact by Judge Glenn.

7. Greenwood County would respectfully show that after the orders of the District Court, the County obtained $140,000.00 from the Public Works Administration in March, 1937, of which $90,000.00 was earmarked for the acquisition of lands in the proposed basin. These respondents would respectfully show that the total cost of lands makes approximately $250,000.00; that the County has had titles to the property abstracted and surveys made and has secured options on most of the acreage, which expire June 30, 1937. It is imperative from the County's viewpoint that these options be exercised prior to that time, which is only possible if additional funds can be obtained from the Public Works Administration by way of loan or grant and if these options are not exercised these respondents anticipate there will be great difficulty in renewing them at their present favorable figures.

That the costs of labor and material since the County received bids on the Saluda River project in the summer of 1935 have substantially increased and these costs, particularly the cost of electrical machinery, are continuing to rise and the County's ability to build this plant within the allotted money is being jeopardized by the continued delay.

That by reason of this litigation which has continued over a period of more than two and one-half years, the County has been forced to incur additional engineering expenses, substantial Court and legal fees and further delay in obtaining the money and going forward with the project will result in a very substantial increase in the total aggregate cost of the project for these reasons.

8. The County would respectfully show to this Court that it is ready to expedite the appeal in any way it can; (842) it stands ready to agree promptly on a statement of the evidence with counsel for Duke Power Company and to cooperate in so far as possible with counsel for Duke Power Company in preparing the appeal; is ready and willing to have the appeal set down for any time which will suit the Court's convenience during the months of July or August in order that the appeal may be promptly disposed of, and if either side feels aggrieved by the decision of this Court, the Record may be filed in the United States Supreme Court in time for a decision by that Court during the Fall Term.

9. The respondents would further show that the County proposes to appeal from the portion of Judge Glenn's order dividing the costs and stands ready to perfect that appeal promptly and to have it heard as early as the convenience of the Court permits.

WHEREFORE these respondents ask that the Court refuse the petition for an order of supersedeas in this case and that the Court set the case down for trial as early as the Court's convenience permits, and direct counsel for all parties to cooperate in expediting the filing of the transcript in this Court.

W. H. NICHOLSON,
R. F. DAVIS,
D. W. ROBINSON, JR.,
Counsel for Greenwood County and its Finance Board.

June 18th 1937.

State of South Carolina,
County of Greenwood.

E. L. Brooks being first duly sworn, says:

That he is a member of the Finance Board of Greenwood County, one of the respondents in the above entitled action. That he has read the foregoing Return of Greenwood County and its Finance Board to the Petition of the Plaintiffs for an Order of Supersedeas and

the same is true of his own knowledge except as to matters therein stated on information and belief and (843) those he believes to be true.

E. L. BROOKS.

Sworn to before me this the 18th day of June, 1937.

W. R. DUNN (L. S.)
Notary Public for S. C.

ARGUMENT ON PETITION OF APPELLANTS FOR STAY OF PROCEEDINGS PENDING APPEAL.

June 19, 1937, (June term, 1937) cause came on to be heard on the petition of the appellants for a stay of proceedings pending appeal before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

ORDER RESTRAINING APPELLEES PENDING APPEAL.

Filed and Entered June 19, 1937.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 4209.

Duke Power Company and Southern Public Utilities Company, Appellants,

v.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, Members of and Constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Administrator of Public Works, Appellees.

ORDER

This is an application by appellants in the above entitled cause for an order preserving the status quo of the case pending the appeal. The appeal is from a final decree of the District Court of the United States, for the Western District of South Carolina, denying plaintiffs injunctive relief and dismissing their bill of complaint on the merits. A preliminary injunction was granted by the District Judge on February 1, 1937. Appellants have been unable to apply to the District Judge for an order restoring and continuing the preliminary injunction because of the illness of the District Judge.

The case was before this Court or two former appeals, (844) each of said appeals being by the defendants from injunctive decrees granted plaintiffs, (79 Fed. (2d) 995; 81 Fed. (2d) 986). On the second appeal of the defendants this Court reversed the decree of the District Court granting an injunction and ordered that the bill be dismissed. On petition of the present appellants the United States Supreme Court granted a writ of certiorari, May 18, 1936 (298 U. S. 651), and thereafter on December 14, 1936, without expressing an opinion on the merits, reversed the decree of this Court and remanded the cause to the District Court to vacate the decrees theretofore entered in the cause by that Court, to permit the parties to amend their pleadings and to retry the cause upon the issues thus presented. The present appeal is from the decree of the District Court entered in consequence of the re-trial.

The importance of the case and of the issues involved therein is shown by the action of the U. S. Supreme Court in granting the writ of certiorari to review the former decree of this Court. The attention of the Court has also been called to the fact that the U. S. Supreme Court on June 1, 1937 granted writs of certiorari directed to the United States Court of Appeals for the District of Columbia to review decrees entered by that Court in three similar cases. These cases are now pending before the U. S. Supreme Court and in all probability will be heard in the early part of the October Term 1937.

It thus appears that the U. S. Supreme Court has already determined that the questions involved in this case

are of such importance that they should be finally settled and determined by that Court. In the meantime for appellees to proceed with the undertaking, while the appeal is pending, would tend to frustrate the purpose of the appeal and, in the event of a reversal or modification of the decree appealed from, to render the action of the Appellate Court of no effect and to cause irreparable injury to appellants. Under these circumstances the rule is well settled that the status quo of the case (845) should be preserved pending the appeal, or until the further order of this Court. It is therefore,

ORDERED, ADJUDGED AND DECREED, that:

1. The defendant, Harold L. Ickes, as Federal Emergency Administrator of Public Works, his attorneys, officers, agents, successors in office, and all persons acting in aid of them, and each of them, be, and they hereby are, restrained and enjoined during the pendency of this appeal, or until the further order of this Court, from in any manner aiding in the construction of the Buzzard Roost Project referred to and described in the original bill of complaint or any part of said project, except as hereinafter provided; and from advancing, lending, granting, or paying over to Greenwood County, or to any officer, agent, or representative of said County, any funds whatsoever of the United States for the purpose of constructing, financing, or operating said Buzzard Roost project or any part thereof, or from otherwise appropriating or permitting to be used any federal funds in furtherance of said project.

2. The defendants, Greenwood County, E. L. Brooks, S. A. Agnew, and E. I. Davis, as members of and constituting the Finance Board for Greenwood County, and all other officers, agents, or representatives of said County, and their successors in office, and each of them, be, and they hereby are, restrained and enjoined during the pendency of this appeal or until the further order of this Court, from receiving, accepting, or using, or permitting to be used, any funds of the United States for the purpose of constructing or operating said Buzzard Roost Project or any part thereof.

PROVIDED that the foregoing Order shall not pre-

vent the payment to Greenwood County, and the receipt by it, (in addition to funds already advanced) of a sum not in excess of One Hundred and Fifty Thousand Dollars ($150,000) for use by it in paying legal, engineering and other administrative expenses, and in the purchase of necessary land should an emergency arise for such (846) purchase, this exception being made without prejudice to the rights of any of the parties.

Dated this 19th day of June, A. D. 1937.

JOHN J. PARKER,
Senior Circuit Judge.

Endorsed:

Service accepted June 19, 1937.
D. W. ROBINSON, JR.
Atty. for Greenwood County.

Same day, to-wit, June 19, 1937, the appearance of W. S. O'B. Robinson, Jr. is entered for the appellants and cross-appellees.

June 21, 1937, certified copy of restraining order of June 19, 1937, transmitted to the Clerk of the District Court at Greenville, S. C.

June 24, 1937, the appearance of John W. Scott, Special Assistant to the Attorney General; Jerome N. Frank, Special Counsel Power Division, PWA; Robert E. Sher and William J. Dempsey is entered for Harold L. Ickes, as Federal Emergency Administrator of Public Works, appellee and cross-appellant.

Same day, the appearance of D. W. Robinson, Jr., W. H. Nicholson and R. F. Davis is entered for Greenwood County and its Finance Board, appellees and cross-appellants.

July 10, 1937, the transcript of record is filed.

Same day, the original petition for appeal, order allowing appeal of the Duke Power Company and Southern Public Utilities Company, bond and citation are certified up under section 7 of Rule 14.

Same day, the original petition for cross-appeal, order allowing cross-appeal of Greenwood County and its Finance Board, bond and citation are certified up under section 7 of Rule 14.

Same day, the original petition for cross-appeal, order allowing cross-appeal of Harold L. Ickes, as Federal (847) Emergency Administrator of Public Works, and citation are certified up under section 7 of Rule 14.

Same day, the original exhibits are certified up.

July 12, 1937, the appearance of James W. Morris, Assistant Attorney General, and Enoch E. Ellison, Attorney, Department of Justice, is entered for the appellees and cross-appellants.

SUPPLEMENTAL ASSIGNMENT OF ERRORS AND ORDER THEREON.

Filed July 13, 1937.

(Memo. of Clerk: This is printed at page 831 of the record and is, therefore, omitted here.)

July 23, 1937, twenty-five copies of volumes I and II of the printed record are filed.

July 26, 1937, the appearance of W. B. McGuire, Jr. is entered for the appellants and cross-appellees.

July 28, 1937, the appearance of Raymond T. Jackson is entered for the appellants and cross-appellees.

ARGUMENT OF CAUSE.

August 3, 1937, (June term, 1937) cause came on to be heard before Parker, Northcott and Soper, Circuit Judges, and is argued by counsel and submitted.

OPINION.

Filed August 6, 1937.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 4209.

DUKE POWER COMPANY and SOUTHERN PUBLIC UTILITIES COMPANY,
Appellants and Cross-Appellees,

versus

GREENWOOD COUNTY and E. L. BROOKS, S. A. AGNEW and E. I. DAVIS, members of and constituting the Finance Board of Greenwood County, and HAROLD L. ICKES, as Federal Emergency Administrator of Public Works,
Appellees and Cross-Appellants.

Cross-Appeals from the District Court of the United States for the Western District of South Carolina, at Greenville.

(Argued August 3, 1937. Decided August 6, 1937.)

Before PARKER, NORTHCOTT and SOPER, Circuit Judges.

W. S. O'B. ROBINSON, JR. and RAYMOND T. JACKSON (NEWTON D. BAKER, W. R. PERKINS, H. J. HAYNSWORTH,

J. H. MARION and W. B. MCGUIRE, JR. on brief) for Appellants and Cross-Appellees, and W. H. NICHOLSON and D. W. ROBINSON, JR. (R. F. DAVIS and JAS. F. DREHER on brief) for Greenwood County and its Finance Board, Appellees and Cross-Appellants, and JEROME N. FRANK, Legal Counsel, Federal Emergency Administration of Public Works, and ENOCH E. ELLISON, Attorney, Department of Justice, (JAMES W. MORRIS, Assistant Attorney General; PAUL FREUND, Special Assistant to the Attorney General; E. H. FOLEY, JR., General Counsel; ROBERT E. SHER, Assistant Legal Counsel, and WILLIAM J. DEMPSEY, Special Counsel, Federal Emergency Administration of Public Works, on brief) for HAROLD L. ICKES, as Federal Emergency Administrator of Public Works, Appellee and Cross-Appellant.

PARKER, Circuit Judge:

This is the third time that we have had before us the suit of the Duke Power Company and its subsidiary, the Southern Public Utilities Co., to enjoin the construction by Greenwood County, S. C. of a power dam at Buzzard Roost Falls on the Saluda River and to enjoin Harold L. Ickes, the Federal Administrator of Public Works, from making a loan and grant of $2,852,000 to the county under the provisions of Title II of the National Industrial Recovery Act, 48 Stat. 200, for the construction of the project. Upon the first appeal we remanded the cause in order that the court below might reconsider its decision in the light of a new contract which had been entered into between the county and the Administrator of Public Works. *Greenwood County v. Duke Power Co.* (C. C. A. 4th) 79 Fed. (2d) 995.

On the second appeal, we reversed the decree of the District Court granting an injunction, and directed that the bill of complaint be dismissed for want of equity,

holding: (1) that the courts were bound by the finding of the Administrator that the project could be constructed within the limits of the loan and grant and would be a self liquidating project within the meaning of the Act of Congress and the policy of the Public Works Administration; (2) that we were bound by the decision of the South Carolina Supreme Court in *Park* v. *Greenwood County* 174 S. C. 35, 176 S. E. 870 to the effect that the construction of the power plant and the issuance of revenue bonds to pay for same were within the the powers of the county; (3) that the statute under which the Administrator proposed to make the loan was constitutional; (4) that the Administrator was acting within his powers in making same; and (5) that no legal right of plaintiffs was infringed by the making of the loan or the construction of the project, and that plaintiffs for this reason were not entitled to an injunction in any event. *Greenwood County* v. *Duke Power Co.* (C. C. A. 4th) 81 Fed. (2d) 986. The Supreme Court granted certiorari and held that we had erred in our order remanding the case on the first appeal in that we had not vacated the decree appealed from, and that this error on our part had misled the District Judge so that he unduly limited the hearing upon the remand. It declined therefore, to pass upon any of the questions upon which we had ruled on the second appeal, but remanded the cause to the District Court with direction that the decree entered by that court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts and that the cause be retried upon the issues thus presented. *Duke Power Co.* v. *Greenwood County* ..... U. S. ....., 57 S. Ct. 202.

Upon receipt of mandate from the Supreme Court the District Court entered an order setting aside the decrees which it had theretofore rendered, permitted amended pleadings to be filed and set the case down for hearing *de novo* over the protest of counsel for plaintiffs, who contended that the hearing should be

limited to matters which had occurred subsequent to the first appeal. As we interpret the opinion of the Supreme Court, however, the course adopted by the District Judge was entirely correct. The case was one in which it appeared, to use the language of the Supreme Court, that supervening facts required "a retrial in the light of a changed situation"; and, in passing upon the effect of the new contract and the relief appropriate in the light of the changed situation, there was no reason why the District Judge should have considered himself limited in any way by the evidence introduced or findings made upon prior hearings. The setting aside of the decrees in the District Court left the cause in precisely the position that it would have occupied if no final decree had ever been entered; and we think there can be no doubt as to the power of the court in an equity cause, until final decree has been entered, to hear additional evidence and modify or set aside any finding of fact theretofore made. *Fourniquet* v. *Perkins* 16 How. 82; *Glades County* v. *Detroit Fidelity & Surety Co.* (C. C. A. 5th) 65 Fed. (2d) 252; *Wagner* v. *Meccano* (C. C. A. 6th) 235 Fed. 890; *Dangerfield* v. *Caldwell* (C. C. A. 4th) 151 Fed. 554. The opinion of the Supreme Court determines none of the issues raised in the cause but directs that, after the pleadings shall have been amended, it "be retried upon the issues then presented"; and it is well settled that the granting of a new trial by an appellate court reopens every issue in the case, except as to questions definitely and finally determined upon the appeal. *American Surety Co.* v. *Jackson* (C. C. A. 9th) 26 Fed. (2d) 248; *Shell Petroleum Corp.* v. *Shore* (C. C. A. 10th) 80 Fed. (2d) 785; *Glades County* v. *Detroit Fidelity & Surety Co.*, *supra*; *Cyclopedia of Federal Procedure*, vol. 6, p. 820.

Upon the retrial had in the court below the evidence theretofore taken in the cause was introduced, including the new contract and the other evidence received following the first remand, as well as the evidence taken prior

to the first appeal. Additional evidence was also introduced bearing upon the loss which plaintiffs would sustain from competition resulting from the construction of the project and upon the consideration given by the Administrator and his subordinates to the effect on power rates of other projects for which application for loans and grants had been made. The judge below filed an exhaustive opinion upon all of the questions presented and set forth his findings of fact and conclusions of law fully and completely as required by the equity rules. He held the statute under which the loan and grant were made to be constitutional and the action of the Administrator in making same to be a valid exercise of his authority under the statute. He dismissed the bill, therefore, taxing one-half of the costs, however, against the defendants on the ground that they had prolonged the litigation by opposing the application of plaintiffs to intervene in the case of *Park* v. *Greenwood County* 174 S. C. 35, 176 S. E. 870, when that cause was pending before the Supreme Court of South Carolina. From the decree dismissing the bill, the plaintiffs have appealed, and the defendants have appealed from so much of it as taxes them with costs. The appeals present four questions for our consideration: (1) whether the statute under which the Administrator has made the loan and grant is a valid exercise of Congressional power, (2) whether the making of the loan and grant by the Administrator is within the power granted him by the statute, (3) whether, in any event, any right of plaintiffs is violated by the making of the loan and grant, and (4) whether any costs should have been taxed against defendants.

STATEMENT OF FACTS.

The facts are as follows: the plaintiff power company, which operates in the Piedmont section of the Carolinas, and to which we shall hereafter refer as the

plaintiff, is the only large power company doing business in Greenwood County, South Carolina, and surrounding counties. The record shows, however, that it furnishes not exceeding 15% of the power now used in Greenwood County, the remainder being supplied by steam plants of manufacturing companies. After the passage of the National Industrial Recovery Act in 1933, officials of that county, without solicitation or suggestion from the Public Works Administration, conceived the plan of obtaining authority from the State of South Carolina for the construction by the county of a dam and power plant at Buzzard Roost Falls on the Saluda River and of obtaining a grant and loan from the Public Works Administration for financing the project. Authority from the state was duly obtained (XXXVIII S. C. Stats. 411, 1392) and application for loan and grant in the total sum of $2,800,000 was made by Greenwood County to the Administrator of Public Works in November 1933. Without consulting with the Public Works Administrator, the county prepared and included in its application a schedule of rates to be charged for the sale of electric energy to the various classes of its proposed customers. Notwithstanding the change in the contracts between the county and the Administrator, to which we shall refer hereafter, these rates have never been changed.

After full consideration of the application by the Administrator of Public Works, an allotment was made for this project on June 19, 1934, and was approved by the President of the United States on the following day. Plaintiff having asked to be heard in opposition to the allotment was accorded a hearing on July 2, 1934, and the matter was held in abeyance until November 7th, when the allotment was reaffirmed by the Administrator and the President. A contract was thereupon entered into between the Administrator and the county on December 8, 1934, under which the Administrator agreed to make a grant to the county for the development of the

project of thirty per cent of the cost of labor and materials, not to exceed the sum of $682,000, and to buy such portion of the $2,219,000 of 4% revenue bonds to be issued by the county for its construction as should not be sold to outside parties. One of the provisions of the contract was that the government should be under no obligation to take the bonds or make any portion of the grant if the county should not have adopted a schedule of rates satisfactory to the Administrator. After the decision of the Circuit Court of Appeals of the Eighth Circuit in *Arkansas-Missouri Power Co.* v. *City of Kennett* 78 Fed. (2d) 911, holding that the execution of a contract with such a provision was beyond the power of a municipal corporation of Missouri, and after the decision of Judge Watkins below, holding that such a provision gave the Administrator control over the rates to be charged, this provision was eliminated from all contracts thereafter executed by the Administrator; and on November 30, 1935 the county and the Administrator entered into a new contract superseding that of December 8, 1934. The new contract gave the Administrator no power whatever with respect to rates to be charged by the county, and contained the following provisions:

"12. The Administrator and the Government shall have no right or power of any kind with respect to the rates to be fixed or charged for the services and facilities afforded by the project, excepting only such rights as they may have as a holder of such bonds under the laws and Constitution of South Carolina, and the lawful proceedings of the applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

"13. This agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the applicant and the government or any of its agencies in any way relating to said project."

It is the contention of plaintiff that the loan and grant were made to the county by the Administrator for the purpose of affecting the rates charged by plaintiff for electric power, and at all events, that the inevitable effect of the construction of the project will be to lower rates in the territory in which plaintiff operates; and much testimony was adduced as to the policy of the Public Works Administration in approving loans and grants for power projects. As to this it appears that the Electric Power Board of Review which was set up in 1933, but which was abolished by order of the Administrator on March 16, 1935, did have a policy with respect to approving loans to municipal power projects to the effect that such projects should meet standards of social desirability, as well as engineering soundness and reasonable security. Social desirability, under this policy, depended among other things upon whether or not the municipal project would provide current at rates substantially less than those at which it was provided by an existing utility; and, in cases where such utility would lower its rates to meet those proposed by the municipality, the policy was not to approve the municipal project. After the Electric Power Board of Review was abolished, the Power Division of the Public Works Administration was placed in charge of the approval of applications for loans and grants for power projects; and its policy has been that, for a municipal power project which is to be financed by revenue bonds to secure approval, its proposed rates must be sufficiently low to secure business and sufficiently high to take care of the interest and amortization payments on the bonds (R. 671). Social desirability is assumed when the application comes from a city. (R. 672). The Administrator testified that there has in reality been no change in the policy of the Public Works Administration with respect to power loans (R. 656); that they were considered on the same basis as other loans, the primary consideration be-

ing "social desirability, ability of the community to finance its share of it and its relationship to the question of unemployment" (R. 647); and that, in the case of a project to be financed by revenue bonds, the only interest which the Administrator had in the rates was whether or not the rates to be charged would repay the loan within the time limited in the contract. (R. 647).

The fact seems to be that the policy of the Public Works Administrator has been to take into consideration the rates of competing utilities in considering applications for loans and grants for the construction of municipal power plants, and that one of the chief reasons for this is that the construction of a municipal plant would not ordinarily be a financially sound proposition unless it should be able to obtain business in competition with existing utilities; that, in the beginning, much emphasis was placed upon the social desirability of lowering power rates to the public; but that, after the policy of the Public Works Administration had been attacked on the ground that, by attempting to bring about lower power rates, it was interfering with a matter reserved to state control, this emphasis on "social desirability" of lower rates has been largely abandoned and the consideration of competitive rates has been had with reference to the financial security of the loan rather than the "social desirability" of the enterprise, the lowering of rates being regarded as an incidental result of the policy of making such loans and grants and not as one of the chief purposes thereof. In this connection, and as bearing upon the reasonableness of the contention that the Administrator has been abusing the power committed to him for the purpose of affecting local power rates, it appears that as of January 1, 1937, there were 9389 "non-federal" projects of the Public Works Administration, of which only 282 were power projects. Of these only 92 involved competition with existing private companies; and the total amount of money involved in these 92 pro-

jects was only $27,339,947.00, as compared with $1,480,612,543 involved in the 9389 non-federal projects, or less than 2%.

As to the policy applied in making the grant and loan here under consideration, the evidence is that the Public Works Administration had nothing to do with fixing the rates to be charged by the County; that there was no intention, in making the loan and grant, to affect the rates of plaintiff, and that those rates were taken into consideration only in connection with the financial security of the loan. As to this the Judge below found:

"XVIII.

"I find that the defendant, Harold I. Ickes, Federal Emergency Administrator of Public Works, in making this allotment of funds to Greenwood County and in entering into the contract with the county, had no purpose other than that set out in the Act of Congress and that the policy of the Public Works Administration is correctly set out in the Administrator's report to the United States Senate, (73rd Congress, 2nd session, Senate Document 167; Defendant's Exhibit 70):

"'The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works, thereby increasing the consumption of goods and also providing employment in the capital goods industry.'

XIX.

"In view of the fact that the proposed loan to Greenwood County was to be evidenced by revenue bonds, it was necessary for the Public Works Administration, in order to carry out Congress' mandate that the loan should be reasonably secured (48 Stat., 203), to examine into the rates of the plaintiff who operated in the territory in which the Greenwood project would be developed. It was necessary that the Administrator be satisfied that the County's proposed rates were low enough to obtain customers and high enough to yield a revenue sufficient to liquidate the bonds."

As to the contention that the construction of the project would necessarily affect rates, the Judge below found, and his finding is amply supported by the testimony, that the county project would not serve as a yardstick for the fixing of private utility rates because of the difference in construction costs, difference in overhead, freedom from taxation etc. He further found that any effect which the construction of the county project will have on plaintiff's rates will be the result of the voluntary construction of an electric project by the county and the voluntary decision of the county to use that project in competition with plaintiff. As to the extent of this competition, he found that at the most the county plant will produce only about 25,000,000 K. W. H. of electricity; that the county has plans to sell only 12,000,000 K. W. H. of this to those who are now customers of plaintiff; that in 1936 plaintiff sold 2,476,000,000 K. W. H. in the Piedmont Section of the Carolinas; and that this was an increase of 380,000,000 K. W. H. over its 1935 sales. In other words the business which the county project will take from plaintiff is less than one half of one per cent of the business which it did in 1936 and less than four per cent of the amount by which that business was increased over the business of 1935. There is evidence that the gross income of the business which will be taken from plaintiff by the county contracts amounts to about $250,000 per year; and there is evidence that the demand for electric current is constantly growing and that new construction is constantly being required of plaintiff to take care of the growing demand.

THE CONSTITUTIONALITY OF THE STATUTE.

The question of the constitutionality of the statute (Secs. 201 et seq. of Title II of the National Industrial Recovery Act) was so thoroughly considered by us on the former appeal that we feel that we need do little more than refer to our former opinion for an expression of our

views. See 81 Fed. (2d) at pages 991 to 995. Confusion in thinking results from the method employed by plaintiff of arguing that the statute is unconstitutional "as applied by the Public Works Administrator" in making the loan and grant here under consideration. This involves, of course, two questions: (1) the validity of the Act of Congress when tested by the Constitution, and (2) the authority of the Administrator when tested by the Act of Congress. A statute may not be held void because of the action of an executive officer in applying its provisions. Even when there is an abuse of executive power against which the courts cannot relieve because of their inability to control administrative discretion, the Act of Congress under which the action is taken is not rendered invalid any more than it is by action which is absolutely unauthorized. The constitutional validity of the statute must be considered, therefore, without reference to what the Administrator is doing under it; and, for the reason set forth in our former opinion, we think it is a valid exercise by Congress of the power to tax and spend for the general welfare, that it cannot be condemned as an invasion of the powers reserved to the states under the 10th Amendment and that it does not embody an unconstitutional delegation of legislative power to the executive.

Our conclusion that it is within the power of Congress to tax and spend for the relief of unemployment nation wide in scope, and that the construction of a nation wide program of public works is an appropriate exercise of the power, is fortified by the recent decisions of the Supreme Court upholding the Social Security Act, particularly the case of *Chas. C. Steward Mach. Co.* v. *Davis* ..... U. S. ....., 57 Sup. Ct. 883, wherein the Court, speaking through Mr. Justice Cardozo, said:

"During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights.

Often the average was more than 10 million, at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States* v. *Butler*, 297 U. S. 1, 65, 66, 56 S. Ct. 312, 319, 80 L. Ed. 477, 102 A. L. R. 914; *Helvering* v. *Davis*, 300 U. S. ....., 57 S. Ct. 904, 81 L. Ed. ....., decided herewith. The nation responded to the call of the distressed. Between January 1, 1933, and July 1, 1936, the states (according to statistics submitted by the government) incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938 the national government expended for public works and unemployment relief for the three fiscal years 1934, 1935, and 1936, the stupendous total of $8,681,000,000."

In *Helvering* v. *Davis* ..... U. S. ....., 57 Sup. Ct. 904, another case involving the Social Security Act, the Court, again speaking through Mr. Justice Cardoza, said:

"Congress may spend money in aid of the 'general welfare.' Constitution art. 1 sec. 8; *United States* v. *Butler*, 297 U. S. 1, 65, 56 S. Ct. 312, 319, 80 L. Ed. 477, 102 A. L. R. 914. *Steward Machine Co.* v. *Davis, supra.* There have been great statesmen in our history who have stood for other views. We will not resurrect the contest. It is now settled by decision. *United States* v. *Butler, supra.* The conception of the spending power

advocated by Hamilton and strongly reinforced by Story has prevailed over that of Madison, which has not been lacking in adherents. Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. *The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.* This is now familiar law. 'When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.' *United States* v. *Butler, supra,* 297 U. S. 1 at page 67, 56 S. Ct. 312, 320, 80 L. Ed. 477, 102 A. L. R. 914. Cf. *Cincinnati Soap Co.* v. *United States,* 300 U. S. ....., 57 S. Ct. 764, 81 L. Ed. ....., May 3, 1937; *United States* v. *Realty Co.,* 163 U. S. 427, 440, 16 S. Ct. 1120, 41 L. Ed. 215; *Head Money Cases,* 112 U. S. 580, 595, 5 S. Ct. 247, 28 L. Ed. 798. Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times.

"The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from state to state, the hinterland now settled that in pioneer days gave an avenue of escape. *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 442, 54 S. Ct. 231, 241, 78 L. Ed. 413, 88 A. L. R. 1481. *Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation.* If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co., supra,* has set the doubt at rest." (Italics ours).

Likewise, our conclusion that the statute cannot be condemned as an invasion of the reserved powers of the

states is fortified by the decision in *Steward Mach. Co.* v. *Davis, supra*, wherein the Court said that before a statute could be condemned on this ground there must be a showing that the things which it authorizes are "weapons of coercion, destroying or impairing the autonomy of the states." 57 S. Ct. 890. The carrying out of the program of public works authorized by the statute for the relief of unemployment cannot possibly have this effect; and, specifically, the making of loans and grants to municipal corporations to enable them to engage in enterprises which the states have authorized them to engage in cannot, in any use of language, be said to abridge or invade the powers of the states. As we said in our former opinion, "It is an entirely different thing from giving or lending money to private persons for the purpose of defeating a state policy or regulating matters under state control." Any effect which such loans and grants may have upon rates will be incidental to the competition engendered by the construction of the projects; and where the state itself authorizes the projects and the procuring of the loans and grants for their construction, as did South Carolina in this case (*Park* v. *Greenwood County, supra*), and retains the right of regulating the rates through the exercise of state power, it cannot be contended with any show of reason that the power of the state is encroached upon by the making of the loans and grants or by the competition resulting from the construction of the projects which they make possible.

As to the delegation of legislative power to the executive, we pointed out in our former opinion that it was out of the question for Congress to have prescribed the details of an extensive program of public works for the relief of the national emergency; that Congress had appropriated the money for the purpose, had laid down in the statute the principles which were to guide the President and the Administrator in its expenditure and had left to them the working out of the details; and that

the selection of projects and the making of loans and grants in carrying out the policy thus laid down by Congress was the exercise of administrative, not legislative, discretion. At least as to the classes of projects enumerated in Sec. 202 [and the project here falls within classes (a), (b) and (c)], Congress "lays down a legislative standard and declares a legislative policy with requisite definiteness and impliedly directs the President to effectuate the purposes of the Act and to make loans and grants, within the limits of a reasonable administrative discretion, to projects that fall within the classes enumerated in section 202 and the limitation of 203 and 206". *Kansas City Gas & Electric Co.* v. *City of Independence* (C. C. A. 10th) 79 Fed. (2d) 32, 43.

In addition to this, it is clear that Congress has ratified and approved the program of public works formulated by the executive department under the act, by making additional appropriations for the carrying out of the program which had been laid before it. In response to Senate Resolution No. 100, 73d Congress, approved February 15, 1934, the Administrator, on March 26, 1934, submitted a report to the Senate (Senate Document 167, 73d Congress, Def. Ex. No. 70) for the period ending February 15, 1934. The report contains a list of federal and non-federal projects and includes the project here involved in a list of those on which final action had not been taken at that time (p. 173). Three months later, Congress passed the Emergency Appropriation Act, approved June 19, 1934, c. 648, 48 Stat. 1021, 1055 making available additional funds for carrying out the program. The following year Congress enacted the Emergency Relief Appropriation Act of 1935, 49 Stat. 115, which continued the existence of the Public Works Administration and authorized the continuance of its functions. An amendment offered in the Senate which would have required the selection of projects that would not compete with private enterprise was rejected. 79 Cong. Record 3972, 3973. On March 6, 1936 the Administrator,

at the request of the Senate, reported to it a list of power projects which had been delayed as a result of litigation and included in the list the project here involved. 74th Cong., 2d Sess. Sen. Doc. 184. Thereafter the First Deficiency Appropriation Act, fiscal year 1936, was adopted. 49 Stat. 1597, 1608. That Act provided that a time limitation of July 1, 1938 which it prescribed should not apply to "any project enjoined in any federal of state court", and appropriated $300,000,000 to increase employment by providing for useful public works projects "of the kind and character for which the Federal Administrator of Public Works has heretofore made loans or grants pursuant to Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935". Finally Congress passed the Public Works Administration Extension Act of 1937, containing the provisions of law relating to the availability of funds for carrying out the function of the Public Works Administrator to July 1, 1939. Sec. 201, Title II, Pub. Res. No. 47, 75th Congress. "It is well settled that Congress may, by enactment not otherwise inappropriate, ratify * * * acts which it might have authorized". *Swayne & Hoyt* v. *United States* ..... U. S. ....., 57 S. Ct. 478, 480; *Isbrandtsen-Moller Co.* v. *United States* ..... U. S. ....., 57 S. Ct. 407. If, therefore, it could be held that the National Industrial Recovery Act did not lay down sufficiently precise standards for the exercise of the discretion reposed in the executive, it is clear that this defect has been cured by the subsequent legislation recognizing and approving the action taken by the Administrator and appropriating funds for the carrying out of the program of public works which he has prepared.

We think, however, that there is no need to rely upon this ratification by Congress of this program of the Administrator. The original statute was valid and not to be condemned as an unconstitutional delegation

of legislative power. As said by the Supreme Court in the recent case of *Cincinnati Soap Co.* v. *United States* ..... U. S. ....., 57 S. Ct. 764, 770:

"That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. A striking and pertinent example is afforded by the Act of June 17, 1902, c. 1093, 32 Stat. 388, where all moneys received from the sale and disposal of public lands in a large number of states and territories are set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories. The expenditures are to be made under the direction of the Secretary of the Interior upon such projects as he may determine to be practicable and advisable. The constitutionality of this delegation of authority has never been seriously questioned. See *United States* v. *Hanson* (C. C. A.) 167 F. 881, 884, 885."

THE EXERCISE OF POWER BY THE ADMINISTRATOR.

There can be no question but that the making by the Administrator of loans and grants to an enterprise of the character here involved is authorized by the statute. Sec. 201 of Title II of the National Industrial Recovery Act, 48 Stat. 200, authorizes the President to appoint an Administrator of Public Works and Sec. 202 requires that the Administrator, under the direction of the President shall prepare a comprehensive program of public works, including construction of publicly owned instrumentalities, development of water power and transmission of electrical energy, and any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public. A municipal power plant falls squarely within all three of these classes; and, if

there were otherwise any doubt about the matter, the subsequent legislation to which we have referred, enacted with full knowledge on the part of Congress of the program prepared by the Administrator and of the fact that it included the project here under consideration as well as a number of other non-federal power projects, would remove every basis of controversy with respect thereto. The Administrator, then, is acting within the express authority of the statute when he makes a grant or loan to a municipal power plant such as we have here.

The contention of the plaintiff is that the action of the Administrator in making such a loan and grant should be enjoined in the ground that, in making same, he is actuated by the motive of reducing power rates and that, in any event, the construction of the project made possible thereby will have that effect. There are several answers to this, each of which seems to us to be complete and final.

In the first place, the court below has found, and the finding is supported by evidence, that the Administrator was not actuated by such motive in making the loan and grant to the county; that the Administrator will have no power to coerce or control the action of the county in the matter of rates; that any effect which the construction of the project will have on the rates will be the result of competition which the county will voluntarily enter into; and that on account of differences in cost, overhead, taxes etc. the project will not provide a criterion for the fixing of rates of private enterprises. The contention of plaintiff, therefore as to the motive in the making of the loan and grant here involved must fail on the facts.

In the second place, the Administrator in selecting projects to which loans and grants are to be made under the statute must necessarily exercise an administrative discretion, so as to extend aid to projects which are financially sound and the construction of which will be in the public interest. If, in exercising this discretion,

he adopts the policy of not making loans and grants for municipal projects which will not provide rates to the public lower than competing private enterprises, such policy would seem to accord both with sound finance and with the requirements of justice to existing enterprises. Certainly, a municipal enterprise would have small chance of success if its rates were above those of an existing private utility; and it would not be fair to such utility to encumber the field with a competing enterprise when it was furnishing current to the public as cheaply as such competitor could furnish it. There is nothing in law or common sense which requires the Administrator to ignore such considerations in the exercise of the discretion reposed in him. Congress could certainly have provided that no loans or grants should be made under the Act to a municipal enterprise in cases where an existing private enterprise was furnishing service to the public as cheaply as the municipal enterprise would furnish it; and we see no reason why such criterion may not and should not be adopted by the Administrator. He is not required to select the projects on his program by lot or to close his eyes to the interests of the public or the social desirability of projects among which he must choose. Few projects would seem to have greater social desirability than those which will result in the utilization of undeveloped natural resources and will help supply the rapidly increasing demand for electric power; and we cannot see that it is a valid objection to the selection of such projects that the competition which will be engendered by them may result in the lowering of electric power rates to the public.

In the third place, even if the Administrator have the motive attributed to him by plaintiff, and even if this be an improper motive, the validity of his action is not affected thereby. Equity will restrain where there is lack of power on the part of a public officer, not where there is mere abuse of power in doing from a wrong motive or to accomplish an ulterior purpose that which

the law authorizes. To grant injunction in the latter case would be for the courts to control the executive in the exercise of executive discretion, a thing which under our tripartate form of government they have no power to do. *Isbrandtsen-Moller Co.* v. *United States* ..... U. S. ....., 57 S. Ct. 407, 410; *Dakota Central Telephone Company* v. *South Dakota* 250 U. S. 163, 184; *Louisiana* v. *McAdoo* 234 U. S. 627, 633; *Philadelphia Co.* v. *Stinson* 223 U. S. 605, 620; *Ferris* v. *Wilbur* (C. C. A. 4th) 27 Fed. (2d) 262, 264; *Appalachian Electric Power Company* v. *Smith* (C. C. A. 4th) 67 Fed. (2d) 451, 454. In the case last cited, there were allegations in the bill as to abuse of authority by the members of the Federal Power Commission, as well as allegation with respect to action without authority. In refusing to consider the allegations as to abuse of authority, we said:

"The allegations and prayers of the bill which relate to abuse of authority by the commission need not be considered; for it is clear that it is only on the allegations of want of statutory or constitutional authority that the suit against the commissioners as individuals could under any theory be sustained."

The question was squarely before the Supreme Court in *Dakota Central Tel. Co.* v. *South Dakota, supra,* 250 U. S. 163, which involved the taking over of the telephone companies by the President under a statute enacted under the war power. It was argued that the action of the President was an abuse of the discretion vested in him as the war had virtually ended and the action taken was not for the purpose of prosecuting the war but for regulating telephone rates. (See argument 250 U. S. at 177). In disposing of this contention the Court, speaking through Chief Justice White, said (p. 184):

"The proposition that the President in exercising the power exceeded the authority given him is based upon two considerations. First, because there was

nothing in the conditions at the time the power was exercised which justified the calling into play of the authority; indeed, the contention goes further and assails the motives which it is asserted induced the exercise of the power. But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. *This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.*" (Italics ours).

The fact that the competition which will result from the project may have some effect upon plaintiff's rates cannot affect the validity of the action of the Administrator any more than his motives. It is true, of course, that neither Congress nor the Administrator may do something which they are forbidden to do by calling it something else; but the exercise of a granted power is not rendered unlawful by reason of its incidental effects. *Sonzinsky* v. *United States* ..... U. S. ....., 57 S. Ct. 554, 556; *Magnano Co.* v. *Hamilton* 292 U. S. 40, 44-47.

PLAINTIFF'S RIGHT TO RELIEF.

As we pointed out in our former opinion (81 Fed. (2d) at pp. 997-999), plaintiff is not entitled to the injunction which it asks, irrespective of the constitutionality of the statute or the authority of the Administrator, for the reason that none of its rights is infringed by the making of the loan and grant. Plaintiff argues that the remanding of the case by the Supreme Court amounted to a decision of this point in its favor; but that court expressly declined to express any opinion on the merits and, in the absence of an express holding by it to the contrary, we are of opinion that our former holding with respect to this matter was correct. It is elementary that before a party is entitled to injunctive relief it must

appear that some right of his is threatened with invasion by the action of which he complains. *United Fuel Gas Co.* v. *Railroad Com.* 278 U. S. 300, 310. Now, the action complained of is the making of the loan and grant to the county out of the funds of the United States. While some state courts recognize the right of a taxpayer to enjoin the unauthorized use of public funds, it is well settled in the federal courts that such use of the funds of the United States violates no right of the taxpayer of which he may complain. *Frothingham* v. *Mellon* 262 U. S. 447. Plaintiff contends, however, that the lending of such funds to the county in order that it may engage in competition with plaintiff violates its rights; but the answer to this is that competition by the county violates no rights of plaintiff. *Puget Sound Co.* v. *Seattle* 291 U. S. 619; *Madera Water Works* v. *Madera* 228 U. S. 454. It is true that grounds for relief may exist against action innocent in itself if taken to enable another to violate rights of complainant; but we know of no principle upon which action which violates no right may be enjoined because in aid of another action which violates no right.

It is said that every person engaged in business which is subject only to state control has the right to pursue that business free from the regulation of the federal government. This is true; but the federal government here is not attempting regulation of plaintiff's business. It is merely making a loan and grant to a county which proposes to engage in a competing business, as such county has a right to do; and it is well settled that an act which is unauthorized, but which infringes no right of another, may not be enjoined merely because it will enable a third person to enter into competition with that other. *New Orleans M. & T. R. Co.* v. *Ellerman* 105 U. S. 166, 174; *U. S.* v. *Dern* 63 App. D. C. 28, 68 Fed. (2d) 773; *Keen* v. *Mayor* 101 Ga. 588, 29 S. E. 42; *Milwaukee Horse & Cow Com. Co.* v. *Hill* 207 Wis. 420, 241 N. W. 364, 369.

A case very much in point is the Chicago Junction case 264 U. S. 258. That suit was brought to enjoin an order of the Interstate Commerce Commission which authorized a competing railroad to acquire certain terminals, an action which would result in loss of business to complainant. A majority of the court held that complainant had standing to challenge the order, but only because of provisions of the Transportation Act of 1920. The minority dissented on the ground that that statute was not applicable; but the doctrine that in the absence of that statute complainant would have had no standing, because none of its rights was invaded, was accepted by the entire court. In *Sprunt & Son* v. *United States* 281 U. S. 249, 254, it was held that a shipper had no standing to challenge an order of the Commission which eliminated a rate differential that gave the shipper an advantage over competitors, because such order violated no right of the shipper although resulting in economic loss to him. To the same effect is the decision in *Edward Hines Trustees* v. *United States* 263 U. S. 143, 148.

In passing upon this question, we must not lose sight of the fact that the suit before us is one against the Administrator in his individual capacity to enjoin him from action alleged to infringe the rights of plaintiff. The question of authority on his part becomes material only where it appears that a right of plaintiff will be infringed by his proposed action. If such right is infringed, authority of a valid law will justify action which would otherwise not be justified; but, if no right is infringed, authority or lack of authority is immaterial. The proposed action of the Administrator of which complaint is made is the making of the loan and grant to the county. No one will contend that if such loan and grant were to be made by the Administrator from his own funds or from the funds of a private person, plaintiff would have any standing to enjoin it; and we cannot see that the source of the funds can affect the question of invasion of rights, where plaintiff has no such interest in

the funds as it could protect by injunction. *Frothingham* v. *Mellon, supra.*

The question here under consideration has arisen in a number of cases involving loans and grants by the Administrator of Public Works, and in all of them the decision has been in accord with the views which we have expressed. See *Alabama Power Co.* v. *Ickes* (D. C. App.) ..... Fed. (2d) .....; *Arkansas-Missouri Power Co.* v. *Kennett* (C. C. A. 8th) 78 Fed. (2d) 911; *Allegan* v. *Consumers Power Co.* (C. C. A. 6th) 77 Fed. (2d) 477; *Kansas Utilities Co.* v. *City of Burlington* 141 Kan. 926, 44 P. (2d) 223.

THE QUESTION OF COSTS.

The action of the court below in taxing one-half of the costs against the defendant was based upon the fact that the defendant county and the members of its finance board resisted the application for plaintiff to intervene in the case of *Park* v. *Greenwood County* when that case was pending before the Supreme Court of South Carolina. In this we think there was error. The Supreme Court of South Carolina held, and we must assume properly, that the plaintiff had no right to intervene in that case. We have decided here, not only that the statute complained of was constitutional and that the action of the Administrator of Public Works was authorized thereunder, but also that no right of plaintiff was invaded by the proposed action of the Administrator which would give it any standing in court to contest his action. Under such circumstances we can perceive no reason why plaintiff should not be taxed with the full cost of the litigation or why the defendants should be penalized with taxation of any part of the costs for defending it. Certainly, the opposition of defendants to the intervention of plaintiff in a suit in which it had no right to intervene is no sufficient reason for such taxation, and particularly is this true of the defendant Ickes

who was not a party to the action in the state court and is not shown to have had anything to do with the resistance offered to plaintiff's motion.

Ordinarily, it is true, the taxation of costs in an equity suit is a matter resting in the sound discretion of the trial court and its action with respect thereto will not be reviewed on appeal; but this discretion is to be exercised "not arbitrarily, but with reference to the general principles of equity and special circumstances of each case". *Kell* vs. *Trenchard* (C. C. A. 4th) 146 Fed. 245. And where, as here, the entire decree and the proceedings of the lower court are before us, it is proper for us to consider whether the discretion was properly exercised. *Citizens Bank* v. *Cannon* 164 U. S. 319, 323; *The Scotland* 118 U. S. 507, 519; *Trustees* v. *Greenough* 105 U. S. 527. Under the circumstances here, we think there was no ground for taxing any part of the costs against defendants and that, as to that feature, the decree appealed from should be reversed.

The decree appealed from will accordingly be affirmed except as to the taxation of costs against the defendants, as to which it will be reversed.

SOPER, Circuit Judge: (dissenting)

The conclusion of fact was reached in the prior dissent in this case, (*Greenwood County* vs. *Duke Power Co.*, 81 F. (2d) 986, 999), that the Federal Administrator of Public Works had assumed the authority to reduce the rates for electric energy charged by private corporations engaged in intrastate business, and that he had accomplished this purpose through his control of federal funds distributable under the provisions of Title II of the National Industrial Recovery Act. The conclusion was supported by reference to the public utterances of the Administrator in which he condemned as exorbitant the prices charged by utility companies in general, and the

Duke Power Company in particular, and described his practice in cooperating with municipalities in the grant or refusal of federal funds to establish municipal plants so as to achieve the desired end. He announced that his policy had caused untilty companies to adjust their rates downward in wide areas.

With regard to the project of Greenwood County, the evidence showed that an investigation of the rates charged by the Duke Power Company in the area concerned was made by the Public Works Administration, and that the rates were considered to be excessive; and that the application of Greenwood County for federal funds to establish a competing plant was approved because the lower rates which it proposed to charge had been investigated by the Administrator and found to be reasonable and satisfactory. In furtherance of the policy of the Administrator, a provision was inserted in the first loan and grant agreement with Greenwood County that the Government should be under no obligation to advance the necessary money unless a resolution should have been adopted by the County providing for rates to be charged by it for electric energy satisfactory to the Administrator. Such rates were in fact promulgated by the County. The South Carolina Revenue Bond Act of 1933, Act No. 299, provided in Section 21 that rates for services to be furnished by such a municipal plant should be fixed precedent to the issuance of bonds; section 29 provided that such rates should not be subject to the supervision or regulation of any State Commission or like instrumentality or agency, and Act No. 1095 of the South Carolina Statutes at Large 1934, authorizing Greenwood County to borrow from the Public Works Commission the money to construct the plant, declared that the project was self liquidating and that any indebtedness created therefor should not be a direct and primary obligation of the County.

The additional evidence taken upon the last trial

in the District Court strongly supports the same conclusion. The administrator set up an agency known as the Electric Power Board of Review which from 1933 to March 16, 1935 had charge in an advisory capacity of the applications of municipalities desiring to establish electric power plants. During this period the loan and grant to Greenwood County was approved. The policy announced by members of this body and applied in numerous instances was precisely in accord with the Administrator's plans, and this course was followed not only when a proposal involving revenue bonds was under consideration, but also when general obligation bonds were offered by the municipality. The procedure was to give the established private power company an opportunity to put into effect a rate equal to or lower than the proposed municipal rate, and if this was done, the application of the municipality would be rejected unless it proposed a still lower rate, in which event, the utility was given another opportunity to make a further reduction. The controlling consideration in the establishment of competing plants was the matter of rates and the test applied was that such plants would be established only when the rates would serve as a yardstick to promote the policy of the Public Works Administration to bring about a general reduction of electric power rates.

It is true that since the decision of Judge Watkins in the court below, 10 F. Supp. 854, 12 F. Supp. 70, and the decision in *Arkansas-Missouri Power Co.* vs. *City of Kennett*, 78 F. (2d) 911, which pointed out the illegality involved in the practices of the Administrator, an attempt has been made to repudiate the public statements concerning the policies of the Administration which had been frequently and publicly made by subordinate officials; but these statements conformed so closely to the announcements of the Administrator that the attempt to abandon them amounts to little more than an expression of regret that what had been so widely proclaimed as a

praiseworthy public policy had become a source of danger to the establishment of municipal power projects. The District Judge found that there was in fact a change in the policy of the Administrator after he became doubtful of the validity of his prior acts, but so far as the proposal of Greenwood County is concerned, there was no change that affects the finding of fact that it was approved because it met the requirement that it would bring down the rates of the established local utility. The original contract of December 8, 1934 was revised on November 30, 1935, so as to include a paragraph denying to the Administrator and the Government the right or power to govern the rates to be fixed or charged for the services afforded by the project, excepting such rights as the Government might have as a holder of the municipal revenue bonds; but no new application for the loan and grant was made by the County, no new resolution of approval of the project by the Public Works Administration was given, and no change was made in the rates to be charged by the projected plant which had been adopted prior to the execution of the first contract and had received the approval of the Administrator. In fact, the County adopted a new resolution on December 6, 1935 by which the original rates were confirmed. The change in the contract was obviously made to meet, if possible, the legal objection that had been raised; but no change was made in the unauthorized and invalid condition upon which the proposal had been approved.

It is of course conceded that in the consideration of project for approval the Administrator must necessarily exercise an executive discretion and may properly take into account the question of rates in determining whether a proposed municipal power project will have a reasonable prospect of success. It is claimed on behalf of the Government that such was the extent of his action in this case. But the evidence is to the contrary. Possessing the conviction that the rates approved by State authority

were too high, he determined to use his power as an official of the national government to reduce them; and in carrying his purpose into effect he stepped across the line, went beyond the power conferred upon him by Congress and invaded the reserved powers of the States. If the National Industrial Recovery Act had provided that the power of the Administrator to make loans or grants to municipalities for the establishment of power plants should be exercised so as to reduce by competition the rates of private utilities approved by State authority, such a provision would surely have been unconstitutional. The Administrator proceeded as if such a provision were contained in the statute. The consent of the State in this instance does not save the situation because "state powers can neither be appropriated on the one hand nor abdicated on the other". *Carter* vs. *Carter Coal Co.*, 298 U. S. 238, 295-6.

We are not concerned here merely with the manifestations of an improper motive in the course of the exercise of a lawful power. We are confronted by the exercise of power not authorized by statute nor within the limitations of the Federal Constitution in pursuance of a policy publicly announced. The actions of the Administrator in this respect are of the same nature as the official conduct condemned in *Anchor Coal Co.* vs. *United States*, 25 F. (2d) 462; see also *Philadelphia* vs. *Stimson*, 223 U. S. 605, 620.

When these conclusions are reached, there is seen to be no substance in the argument that no right of the Power Company has been infringed and hence it is not entitled to an injunction. It has indeed no right to be shielded from lawful competition by the County or any other producer of electric power. *Puget Sound Power & Light Co.* vs. *Seattle*, 291 U. S. 619; *Madera Water Works Co.* vs. *Madera*, 228 U. S. 454. But it is entitled to relief against illegal competition which originates and is made effective through an agreement entered into in violation of the law of the land. *City of Camp-*

bell vs. *Arkansas-Missouri Power Co.*, 55 F. (2d) 560; *Frost* vs. *Corporation Commission of Okla.*, 278 U. S. 515. There is of course no parallel between the substantial loss of revenue which the Power Company would suffer as the result of the operation of the municipal plant and the injury to a federal taxpayer from an improper expenditure of federal funds which was held too insignificant to form the basis of a suit in *Frothingham* vs. *Mellon*, 262 U. S. 447.

(848) **DECREE.**

Filed and Entered August 6, 1937.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT

No. 4209.

Duke Power Company and Southern Public Utilities Company, Appellants and Cross-Appellees,

vs.

Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, Members of and Constituting The Finance Board of Greenwood County, and Harold L. Ickes, as Federal Emergency Administrator of Public Works, Appellees and Cross-Appellants.

CROSS-APPEALS from the District Court of the United States for the Western District of South Carolina.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Western District of South Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed except in so far as it taxes one-half of the costs against the defendants below, and as to this it is reversed, and the decree of the District Court is modified accordingly; and that the costs on this appeal and cross-appeal be paid by the appellants and cross-appellees.

August 6th, 1937.

JOHN J. PARKER,
Senior Circuit Judge.

(849) **CLERK'S CERTIFICATE.**

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing (Volumes I and II) is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 19th day of August, A. D., 1937.

(Seal of Court)

CLAUDE M. DEAN,
Clerk, U. S. Circuit Court of Appeals, Fourth Circuit.

[fol. 850] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 25, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted, and the case is set for hearing immediately following Nos. 84 and 85 and the cases are assigned for argument on Monday, December 6th next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S
FILED
SEP 10 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY,

Petitioners.

vs.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FOURTH CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No.....

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY,

Petitioners.

vs.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Duke Power Company and Southern Public Utilities Company, respectfully show:

A.

SUMMARY STATEMENT OF MATTERS INVOLVED

This is an application by petitioners, Duke Power Company and Southern Public Utilities Company, for a writ of certiorari to the United States Circuit Court of Appeals, for the Fourth Circuit, for the review of a decree of that court entered on August 6, 1937 (R. 878-9), whereby the

Court of Appeals affirmed a final decree of the United States District Court, for the Western District of South Carolina, entered on June 2, 1937, denying petitioners, plaintiffs in the District Court, the injunctive relief sought by their bill of complaint and dismissing the bill on its merits.

The cause was before this court at the October Term, 1936 on a previous writ of certiorari to the court below. 298 U. S. 651. Because of the fact that the record then before the court had been improperly made up, the court did not consider the merits; but, in order that the cause might be properly heard and determined, reversed the decree of the Circuit Court of Appeals and remanded the cause to the District Court with directions that the decrees theretofore entered by that court be vacated and for further proceedings. 299 U. S. 259. (R. 539-41). Such proceedings have been had, resulting in the District Court's decree of June 2, 1937.

The decision of the Circuit Court of Appeals, affirming the decree of the District Court, as in the case of its previous decision, was by a divided court, Judges Parker and Northcott constituting the majority, with Judge Parker writing the majority opinion, and Judge Soper writing a dissenting opinion. The questions presented are substantially the same as those presented on the previous writ.

OPINIONS OF THE COURTS BELOW

The opinions rendered in the courts below subsequent to the remand of the case by this court have not yet been reported. Judge Parker's opinion written for the majority of the Circuit Court of Appeals appears in the record at pages 849-873; Judge Soper's dissenting opinion at pages 873-878; and Judge Glenn's opinion rendered in the District Court at pages 744-778.

JURISDICTION

The jurisdiction of this court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; U. S. Code, Title 28, Sec. 347. The decree of the Circuit Court of Appeals, which petitioners seek to have reviewed, was entered August 6, 1937. (R. 878-9).

THE STATUTE INVOLVED

The statute involved is Title II of the National Industrial Recovery Act, Secs. 201, 202, 203, 206, 210(a), and 220, Act of June 16, 1933; 48 Stat. 200, 201, 202, 204, 206 and 210; U. S. C., Title 40, Secs. 401, 402, 403, 406, 410 and 411. The declaration of policy in Title I and the pertinent sections of Title II are printed in Appendix. (pp. 14-20 infra).

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals erred in holding that Title II of the National Industrial Recovery Act (48 Stat. 200, et seq.), as applied to this case and as construed to authorize the action of the Public Works Administrator in making a loan and grant of federal funds to Greenwood County, South Carolina, for the construction of a local municipal electric utility, is constitutional, and in failing to hold that said statute as so applied and construed, is unconstitutional, in that:

(a) It is not within any power delegated to Congress by the general welfare clause, U. S. Constitution, Art. I, Sec. 8, Cl. 1, or by any other clause or provision of the U. S. Constitution; and is violative of the Tenth Amendment to said Constitution, in that it invades powers and governs and controls matters reserved to the States.

(b) It unlawfully delegates legislative power to the executive department of the government, in violation of Art. I, Sec. 1, of the U. S. Constitution, and of the other provisions of said Constitution which prohibit the delegation of legislative power to the executive department.

(c) It deprives petitioners of their property without due process of law, in violation of the Fifth Amendment to the U. S. Constitution.

2. Whether the Circuit Court of Appeals erred in holding that, in the circumstances disclosed by the record, Title II of the National Industrial Recovery Act authorizes the action of the Public Works Administrator in making a loan and grant of federal funds to Greenwood County, South Carolina, for the construction of a local municipal electric utility as a federal public works project.

3. Whether the Circuit Court of Appeals erred in holding that, even if Title II of the National Industrial Recovery Act (48 Stat. 200, et seq.), as applied to this case, be unconstitutional, or the proposed action of the Federal Administrator be unauthorized by said Act, yet petitioners are not entitled to question the legality of said action even though their property and business will be irreparably damaged, if not destroyed, and their rates regulated and reduced by the proposed use of federal funds for the construction of said local electric utility.

MATERIAL FACTS

Petitioners are electric utility corporations selling electric power in South Carolina, at rates approved by the Public Service Commission of that State. They are the only large power companies doing business in Greenwood County, South Carolina, and surrounding counties.

On November 16, 1933, respondent, Greenwood County, made application to the Federal Emergency Administration

of Public Works for a loan and grant of federal funds under Title II of the National Industrial Recovery Act amounting to $2,627,197.00 for the construction of an electric power plant at a point known as Buzzard Roost on the Saluda River in said County. The application was approved in June, 1934, and the amount later increased to $2,852,000. (R. 267-8, 464-5).

The entire cost of the plant would be defrayed by the Federal Government. 30% of the cost would be an outright gift or subsidy, no part of which would ever have to be repaid. The balance of the cost would be represented by a so-called loan, secured by special revenue bonds, both the principal and interest of which would be repayable, if at all, only out of the prospective revenues of the plant. The County itself would make no investment in the plant and would assume no liability or obligation of any character for its construction or operation. But for the federal subsidy and the proposed method of federal financing the construction of the plant would not be possible and its construction, otherwise than as a federal public works project, has never been contemplated. (R. 122-3, 199-200, 785).

The proposed plant would be a purely local enterprise operating in Greenwood County and in the two adjoining Counties of Newberry and Laurens. It would engage in the general utility business of furnishing electric power to municipalities, industrial enterprises, private individuals, and the public generally, for domestic, industrial and commercial uses. (R. 175).

Due to the federal subsidy the rates of the proposed plant have been fixed substantially below the rates of petitioners. Contracts, conditioned upon their approval by the Public Works Administration, have been made with existing customers of petitioners for the sale of practically the entire output of the plant at these lower rates. (R. 691, 371-98).

Should the proposed plant be constructed and put into operation, the effect of the lower rates would be to force petitioners to make reductions in their rates. In the three Counties of Greenwood, Newberry and Laurens alone, petitioners would sustain a net loss of approximately $250,000 a year. (R. 561-2, 566).

THE PROCEEDINGS IN THE CAUSE

The proceedings prior to the remand by this court are fully stated in the opinion of the court. 299 U. S. 259. Briefly stated, they were as follows:

The suit was instituted in the District Court on November 7, 1934. Greenwood County and the members of its Finance Board were named as the original defendants. Harold L. Ickes as Federal Emergency Administrator of Public Works intervened and was permitted to become a party defendant on December 4, 1934. (R. 65).

After intervening, the Administrator filed an answer showing an agreement dated December 8, 1934 (after the commencement of the suit), between the government and Greenwood County, which set forth the terms and conditions of the loan and grant for the construction of the proposed plant. (R. 66-94). Petitioners, plaintiffs in the District Court, by amended and supplemental bill, challenged the constitutional authority of the Federal Government, as well as the statutory authority of the Administrator, to make the loan and grant. Respondents, defendants in the District Court, filed a motion to dismiss the bill for want of equity, which motion the court denied. 10 F. S. 854. (R. 117-153). Respondents answered, evidence was taken and a final decree was entered on August 26, 1935, enjoining respondents from carrying out the contract of December 8, 1934, and further enjoining the defendant Ickes from advancing to the County, and the County from receiving, any federal funds in furtherance of the project. 12 F. Supp.

70. (R. 477-85). Respondents appealed to the Circuit Court of Appeals.

Mr. Ickes, appellant in the Court of Appeals, informed that court that since the taking of the appeal the contract of December 8, 1934 had been terminated and a new agreement, dated November 30, 1935, substituted, eliminating the terms and conditions of the earlier agreement, which he stated had been held by the District Court to be in excess of the authority of the County under the laws of South Carolina.* (R. 492-3). He asked that the cause be remanded to the District Court with leave to the parties to amend their pleadings in accordance with the facts "and for a trial or other disposition of the cause on such amended pleadings." (R. 492-514). In response to this request, the Court of Appeals remanded the cause to the District Court "to the end that that court might reconsider its decision in the light of" the new contract, and might "take such further action as may be appropriate in the premises." (R. 515-18).

In remanding the cause the Court of Appeals did not vacate the final decree of injunction entered in the District Court on August 26, 1935. In the meantime the term of that court at which the decree had been entered had expired.

Upon the further hearing in the District Court pursuant to the mandate of the Court of Appeals, the respondents introduced in evidence the new contract and offered testimony by Mr. Ickes and other witnesses. The District Court

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*In fact Judge Watkins did not hold the terms and conditions of the agreement of December 8, 1934, to be in excess of the authority of the County under the laws of South Carolina. He expressly held that all questions of state law had been conclusively settled in favor of Greenwood County by the decision of the Supreme Court of South Carolina in the case of Park v. Greenwood County, 174 S. C. 35 (R. 126). Judge Watkins' decision on which the decree of injunction was based was placed solely on federal grounds. (R. 117-152).

admitted in evidence the new contract, but, for the reasons stated in a supplemental opinion (R. 518-527), excluded the other evidence offered by respondents. It entered a second decree on December 21, 1935 refusing to set aside and vacate the original decree of injunction of August 26, 1935. (R. 527-8). From this second decree respondents again appealed to the Circuit Court of Appeals. The Court of Appeals reversed the decree of the District Court and ordered the bill to be dismissed, 81 F. (2d) 986, Judge Soper dissenting.

On application of petitioners this court granted a writ of certiorari on May 18, 1936, 298 U. S. 651, and the cause was argued at the October Term, 1936.

This court, for the reasons stated in its opinion rendered December 14, 1936, declined to pass on the merits of the case. 299 U. S. 259. It held that the cause had been heard in the Circuit Court of Appeals on a record improperly made up. Accordingly, and in order that the cause might be properly heard and determined, it reversed the decree of the Circuit Court of Appeals and remanded "the cause with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of existing facts, and that the cause be retried upon the issues thus presented." 299 U. S. 259.

Upon receipt of the mandate of this court, the District Court entered an order setting aside the decrees which it had theretofore rendered, and permitted the parties to file further pleadings, (R. 541-2). The respondents filed supplemental answers showing the new agreement of November 30, 1935, and alleging that this new agreement had entirely superseded the previous agreement of December 8, 1934. (R. 543-6). Petitioners filed a reply to the supplemental answers admitting the execution of the new agreement, but denying that it worked any material change in

the case or in the issues presented. They alleged that the changes made by the substitution of the new agreement for the prior agreement were matters of verbiage only, leaving the loan and grant and the proposed project the same in character, purpose and effect and subject to the same infirmities and objections. (R. 546-8).

The District Court held that the mandate of this court required that the cause be heard de novo, and accordingly did not limit the retrial to matters which had occurred subsequent to the original decree of injunction of August 26, 1935, but heard the entire cause anew. (R. 555-7).

The evidence taken in the cause on the original hearing was treated as a part of the record for the purposes of the retrial. The testimony of Secretary Ickes and other witnesses taken in the District Court following the first remand of the case by the Circuit Court of Appeals was, by stipulation of the parties, introduced as if taken by deposition. Much additional evidence was introduced, relating principally to three questions:

1. The alleged power plan of the Public Works Administration and its alleged policy to use its power to make loans and grants of federal funds for the construction of local electric power plants in such a fashion as to regulate local electric rates and to establish publicly owned local electric power plants whose rates would serve as yardsticks for the reduction of electric rates.*

* On the original hearing petitioners presented evidence showing that the loan and grant for the construction of the proposed plant had been approved because petitioners' rates were "considered excessive, and did "not meet with the approval of the PWA authorities" (R. 300); and that the plant had been selected for construction as a public works project pursuant to the power plan of the Public Works Administration to make loans and grants for competitive municipal plants in such a way as to bring about the reduction of electric power rates; (R. 300, 361-3) and the District Court found as a fact that the loan and grant for the proposed plan had been authorized by the Public Works Administration as a part of this power plan. (R. 122, 480). Additional evidence in support of this conclusion was introduced on the retrial. (R. 576, 578, 593-4, 595-602, 605, 606, 608-9, 611-16, 619-27, 654-664, 702).

2. The new loan and grant agreement of November 30, 1935, entered into between the Government and Greenwood County, in substitution of the previous agreement of December 8, 1934, and whether this new agreement cured the alleged illegality of the original allotment or resolution of the Public Works Administration, whereby the project was included in the socalled comprehensive program of public works and funds allotted for its construction, for the carrying out of which original allotment or resolution the new agreement, like the previous agreement, was entered into. (R. 368, 464-5).

3. The injury which petitioners would sustain as a result of the proposed use of federal funds for the construction of the plant and the effect thereof on their local rates for power. (R. 558-63, 566, 567-70, 670, 688, 691, 696-7).

The District Court upheld the validity of the loan and grant and dismissed the bill on the merits. (R. 799-800). It filed an extended opinion on all the questions involved (R. 744-778) and separately filed findings of fact and conclusions of law. (R. 779-799). Petitioners promptly appealed to the Circuit Court of Appeals and the cause was promptly heard and determined by that court. (R. 848).

In affirming the judgment of the District Court, the Circuit Court of Appeals held that the District Court had correctly construed the mandate of this court as requiring the entire cause to be heard de novo, and not as intended to limit the retrial to matters which had occurred subsequent to the original decree of injunction of August 26, 1935. (R. 850-1). On this point Judge Soper did not dissent. On the questions involving the constitutionality of the statute, the authority of the Administrator under the statute to make the loan and grant, and the right of petitioners to sue, the majority of the Court of Appeals followed the majority opinion on the former appeal. 81 F. (2d) 986. (R. 848-873). On these questions Judge Soper

again dissented, holding that the additional evidence taken upon the retrial strongly supported the conclusions on which his former dissent was based. (R. 873-8).

Upon the cause being remanded and the original decree of injunction being vacated, the District Court restrained respondents, during the pendency of the suit, from making any use of federal funds (with an immaterial exception) in furtherance of the project. (R. 550-2). Upon the cause being docketed in the Circuit Court of Appeals, that court entered a similar restraining order, stating that it was entered on account of the importance of the case and of the issues involved; (R. 843-6) and after its decision it stayed its mandate pending the filing of this application for writ of certiorari and the disposition thereof by this court.

SPECIFICATION OF ERRORS INTENDED TO BE URGED

The errors assigned and intended to be urged by petitioners, should their petition be allowed, are set forth in their assignments of error. (R. 801-819, 831-2). The errors assigned raise the questions set forth in the foregoing statement of the questions presented.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The questions involved in this cause are important questions of federal law which have not been, but should be, settled by this court. They not only affect the interests of the parties to this cause but are of the highest public importance. In addition to this suit and the large interests it affects, both from the standpoint of petitioners and from the standpoint of respondents, there are approximately fifty other suits involving the same questions pending in the lower federal courts. (75th Congress, First Session, Senate Document No. 27).

2. The questions are substantially the same as the questions presented by the previous writ of certiorari granted by this court in this cause. They were not then decided, for the reasons heretofore stated, and still remain undecided by this court. The importance of the questions presented and the propriety of a determination of them by this court would therefore seem to be clear.

3. The importance of the questions involved is further shown by the fact that on June 1, 1937, this court granted writs of certiorari to the United States Court of Appeals for the District of Columbia in the cases of Alabama Power Company v. Ickes, (two cases), and Iowa City Light & Power Company v. Ickes, (Nos. 84, 85 and 86, October term, 1937). The questions involved in those cases, or at least some of them, are similar in character to the questions involved in this case. The record in this case contains substantial evidence not contained in the records in those cases and presents substantially different aspects of the important questions involved. Furthermore in those cases the Court of Appeals for the District of Columbia did not pass upon the question of the constitutionality of the statute or of the statutory authority of the Administrator but passed only on the question of the plaintiffs' right to sue.

4. The conflicts of judicial opinion in this cause between District Judge Watkins, on the original hearing, and District Judge Glenn, on the retrial, and between Circuit Judges Parker and Northcott and Circuit Judge Soper in the Court of Appeals furnish an additional reason why the questions involved should be settled by this Court.

5. In view of the seemingly undeniable desirability that the questions involved should be determined by this Court any discussion of the merits of the cause or of what is believed to be a misapplication by the Circuit Court of Appeals of previous decisions of this Court would appear to be neither necessary nor proper in this petition.

WHEREFORE, these petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all of the proceedings in the case numbered and entitled on its docket No. 4209, Duke Power Company and Southern Public Utilities Company, Appellants, v. Greenwood County and E. L. Brooks, S. A. Agnew, and E. I. Davis, Members of and Constituting the Finance Board of Greenwood County, and Harold L. Ickes, as Federal Administrator of Public Works, Appellees, and that the said decree of said Circuit Court of Appeals for the Fourth Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

DUKE POWER COMPANY, a corporation,

By N. A. COCKE,
Vice-President.

SOUTHERN PUBLIC UTILITIES COMPANY, a corporation,

By E. C. MARSHALL,
President.

NEWTON D. BAKER,
R. T. JACKSON,
W. R. PERKINS,
H. J. HAYNSWORTH,
J. H. MARION,
W. B. MCGUIRE, JR.,
W. S. O'B. ROBINSON, JR.,
Attorneys for Petitioners.

September 8, 1937.

APPENDIX

PERTINENT SECTIONS OF THE NATIONAL INDUSTRIAL RECOVERY ACT.

AN ACT

To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes. (48 Stat. 195).

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

TITLE I—INDUSTRIAL RECOVERY

DECLARATION OF POLICY.

SECTION 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of coöperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources. (48 Stat. 195; 15 U. S. C. 701).

* * * *

TITLE II—PUBLIC WORKS AND CONSTRUCTION PROJECTS

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS.

SECTION 201. (a) To effectuate the purposes of this title, the President is hereby authorized to create a Federal Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereafter referred to as the "Administrator"), and to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed. The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint.

(b) The Administrator may, without regard to the civil service laws or the Classification Act of 1923, as amended, appoint and fix the compensation of such experts and such other officers and employees as are necessary to carry out the provisions of this title; and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books and books of reference, and for paper, printing and binding) as are necessary to carry out the provisions of this title.

(c) All such compensation, expenses, and allowances shall be paid out of funds made available by this Act.

(d) After the expiration of two years after the date of the enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare

that the emergency recognized by section I has ended, the President shall not make any further loans or grants or enter upon any new construction under this title, and any agencies established hereunder shall cease to exist and any of their remaining functions shall be transferred to such departments of the Government as the President shall designate: Provided, that he may issue funds to a borrower under this title prior to January 23, 1939, under the terms of any agreement, or any commitment to bid upon or purchase bonds, entered into with such borrower prior to the date of termination, under this section, of the power of the President to make loans. (48 Stat. 200, 40 U. S. C. 401).

SECTION 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly-owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control and also the construction of any river or drainage improvement required to perform or satisfy any obligation incurred by the United States through a treaty with a foreign Government heretofore ratified and to restore or develop for the use of any State or its citizens water taken from or denied to them by performance on the part of the United States of treaty obligations heretofore assumed: Proyided, That no river or harbor improvement shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction,

reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; and if in the opinion of the President it seems desirable, the construction of naval vessels within the terms and/or limits established by the London Naval Treaty of 1930 and of aircraft required therefor and construction of heavier-than-air aircraft and technical construction for the Army Air Corps and such Army housing projects as the President may approve, and provision of original equipment for the mechanization or motorization of such Army tactical units as he may designate: Provided, however, That in the event of an international agreement for the further limitation of armament, to which the United States is signatory, the President is hereby authorized and empowered to suspend, in whole or in part any such naval or military construction or mechanization and motorization of Army units: Provided, further, That this title shall not be applicable to public works under the jurisdiction or control of the Architect of the Capitol or of any commission or committee for which such Architect is the contracting and/or executive officer. (48 Stat. 201; 40 U. S. C. 402).

SECTION 203. (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202;

(2) upon such terms as the President shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, and to sell any security acquired or any property so constructed or acquired or to lease any such property with or without the privilege of purchase: Provided, That all moneys received from any such sale or lease or the repayment of any loan shall be used to retire obligations issued pursuant to section 209 of this Act, in addition to any other moneys required to be used for such purpose; (4) to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities; and (5) to advance, upon request of the Commission having jurisdiction of the project, the unappropriated balance of the sum authorized for carrying out the provisions of the Act entitled "An Act to provide for the construction and equipment of an annex to the Library of Congress," approved June 13, 1930 (46 Stat. 583); such advance to be expended under the direction of such Commission and in accordance with such Act: Provided, that in deciding to extend any aid or grant hereunder to any State, county, or municipality, the President may consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof. The provisions of this section and section 202 shall extend to public works in the several States, Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

(b) All expenditures for authorized travel by officers and employees, including subsistence, required on account of any

Federal public-works projects, shall be charged to the amounts allocated to such projects, notwithstanding any other provisions of law; and there is authorized to be employed such personal services in the District of Columbia and elsewhere as may be required to be engaged upon such work and to be in addition to employees otherwise provided for, the compensation of such additional personal services to be a charge against the funds made available for such construction work.

(c) In the acquisition of any land or site for the purposes of Federal public buildings and in the construction of such buildings provided for in this title, the provisions contained in sections 305 and 306 of the Emergency Relief and Construction Act of 1932, as amended, shall apply.

(d) The President, in his discretion, and under such terms as he may prescribe, may extend any of the benefits of this title to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness. (48 Stat. 202; 40 U. S. C. 403.)

* * * * *

SECTION 206. All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure (1) that no convict labor shall be employed on any such project; (2) that (except in executive, administrative, or supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week; (3) that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort; (4) that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents, and then in the fol-

lowing order: (A) to citizens of the United States and aliens who have declared their intentions of becoming citizens, who are bona fide residents of the political subdivision and/or county in which the work is to be performed, and (B) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: Provided, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates; and (5) that the maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage. (48 Stat. 204, 40 U. S. C. 406).

* * * *

ISSUE OF SECURITIES AND SINKING FUND

SECTION 210. (a) The Secretary of the Treasury is authorized to borrow, from time to time, under the Second Liberty Bond Act, as amended, such amounts as may be necessary to meet the expenditures authorized by this Act, or to refund any obligations previously issued under this section, and to issue therefor bonds, notes, certificates of indebtedness, or Treasury bills of the United States. (48 Stat. 206; 40 U. S. C. 410(a)).

* * * *

APPROPRIATION

SECTION 220. For the purposes of this Act, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $3,300,000,000. (48 Stat. 210; 40 U. S. C. 411).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY,

Petitioners,

vs.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS,

Respondents.

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS OF THE COURTS BELOW

The opinions of the Circuit Court of Appeals are reported in 91 Fed. (2d) 665. Judge Parker's opinion, written for the Court, appears in the record at pp. 849-873, and Judge Soper's dissenting opinion at pp. 873-878.

The opinion of the District Court subsequent to the remand of the case by this court is reported in 19 Fed. Supp. 932, and appears in the record at pp. 744-778. The opinions of the District Court prior to the remand of the case by this Court will be found: on motion to dismiss, R. 117-52, reported 10 Fed. Supp. 854; on merits after hearing on evi-

dence, R. 477-483, reported 12 Fed. Supp. 70; and on first rehearing, R. 518-527.

JURISDICTION

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code as amended by the Act of February 13, 1925; U. S. Code, Title 28, §347. The decree of the Circuit Court of Appeals to be reviewed was entered August 6, 1937 (R. 878-9). The petition for certiorari was filed in this Court September 10, 1937, and was granted October 25, 1937.

STATUTES INVOLVED

The case involves Title II of the National Industrial Recovery Act, Secs. 201, 202, 203, 206, 210(a), and 220, Act of June 16, 1933; 48 Stat. 200, 201, 202, 204, 206, and 210; U.S.C., Title 40, Secs. 401, 402, 403, 406, 410 and 411. The declaration of policy in Title I and the pertinent sections of Title II appear in the Appendix, separately printed, pages 1-7.

There also appears in the Appendix, separately printed, Act No. 299 of the 1933 Acts of the General Assembly of the State of South Carolina, (Appendix pages 7-22) and Act No. 1095 of the 1934 Acts of the General Assembly of the State of South Carolina. (Appendix, pages 22-23).

STATEMENT OF THE CASE

This cause was before the Court at the October Term, 1936. The merits were not then passed upon but because of irregularities in procedure resulting in the record not being properly made up the cause was remanded for further proceedings.

The petitioner,* an electric public utility corporation, by its amended and supplemental bill of complaint challenged the action of the Federal Emergency Administrator of Public Works in selecting for construction, under Title II of the National Industrial Recovery Act as a public works project, a local electric power plant in Greenwood County, South Carolina, and in allotting federal funds to Greenwood County for the construction of said plant which would be operated in direct competition with petitioner. The petitioner does not seek an injunction against lawful competition by Greenwood County and a decree in favor of petitioner would leave the County entirely free to compete with petitioner in any lawful manner. What petitioner seeks is an injunction against the illegal construction of said plant as a federal public works project by means of federal funds.

After a hearing on the merits the District Court rendered a final decree enjoining the Federal Administrator from advancing and the County and its officials from receiving federal funds for the construction of said plant and also enjoining respondents from carrying out a contract dated December 8, 1934, between the United States and Greenwood County relating to the disbursement of said federal funds.

Respondents appealed to the Circuit Court of Appeals. The Administrator informed that court that, since the taking of the appeal, the contract of December 8, 1934, had been terminated and a new agreement, dated November 30, 1935, substituted and asked that the cause be remanded

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* During the pendency of this litigation the Southern Public Utilities Company, one of the original plaintiffs and the wholly owned subsidiary of the Duke Power Company, the other plaintiff, was merged with the Duke Power Company, which company succeeded to all the assets and liabilities of the Southern Public Utilities Company. Consequently, the Duke Power Company is now referred to as the petitioner.

to the District Court for further hearing. The motion of the Administrator alleged that the terms and conditions of the earlier contract, which he asserted had been held by the District Court to be in excess of the power and authority of Greenwood County under the laws of South Carolina, had been eliminated. It was because of irregularities resulting from the way in which the Circuit Court of Appeals dealt with this motion that this court reversed the decree of the Circuit Court of Appeals and remanded the cause to the District Court with directions that the decrees theretofore entered by that court be vacated, "that the parties be permitted to amend their pleadings in the light of the existing facts and that the case be retried upon the issues thus presented." 299 U. S. 259.

Upon receipt of the mandate of this court, the District Court entered an order setting aside the decrees which it had theretofore rendered, and permitted the parties to file further pleadings. (R. 541-2). The respondents filed supplemental answers showing the new agreement of November 30, 1935, and alleged that this new agreement had entirely superseded the previous agreement of December 8, 1934. (R. 543-6). Petitioner filed a reply to the supplemental answers admitting the execution of the new agreement, but denying that it worked any material change in the case or in the issues presented. It alleged that the changes made by the substitution of the new agreement for the prior agreement were matters of verbiage only, leaving the loan and grant and the proposed project the same in character, purpose and effect and subject to the same infirmities and objections. (R. 546-8).

The District Court held that the mandate of this Court required that the case be heard de novo and accordingly did not limit its inquiry to the effect of the changes made in the contract as presented by the motion to remand, but heard the entire cause anew. (R. 555-7).

The evidence taken in the cause on the original hearing was treated as a part of the record for the purposes of the retrial. The testimony of Secretary Ickes and other witnesses taken in the District Court following the first remand of the case by the Circuit Court of Appeals was, by stipulation of the parties, introduced as if taken by deposition. Much additional evidence was introduced, relating principally to three questions:

1. The new loan and grant agreement of November 30, 1935, entered into between the Government and Greenwood County, in substitution of the previous agreement of December 8, 1934, and whether this new agreement cured the alleged illegality of the original allotment or resolution of the Public Works Administration, whereby the project was included in the so-called comprehensive program of public works and funds allotted for its construction, for the carrying out of which original allotment or resolution the new agreement, like the previous agreement, was entered into. (R. 368-9, 464-5, 562-3).

2. The alleged power plan of the Public Works Administration and its alleged policy to use its power to make loans and grants of federal funds for the construction of local electric power plants in such a fashion as to regulate local electric rates and to establish publicly owned local electric power plants whose rates would serve as yardsticks for the reduction of electric rates. (R. 576, 578, 593-4, 595-602, 605, 606, 608, 611-16, 619-27, 654-64, 702.)

3. The injury which petitioner would sustain as a result of the proposed use of federal funds for the construction of the plant. (R. 558-63, 566, 567-70, 670, 688, 691, 696-7.)

The District Court upheld the validity of the loan and grant and dismissed the bill on the merits. (R. 799-800). It filed an extended opinion on all the questions involved

(R. 744-778) and separately filed findings of fact and conclusions of law. (R. 779-799). Petitioner appealed to the Circuit Court of Appeals. (R. 848).

In affirming the judgment of the District Court, the Circuit Court of Appeals held that the District Court had correctly construed the mandate of this court as requiring the entire cause to be heard de novo, and not as intended to limit the retrial to matters which had occurred subsequent to the original decree of injunction of August 26, 1935. (R. 850-1). On this point Judge Soper did not dissent. On the questions involving the constitutionality of the statute, the authority of the Administrator under the statute to make the loan and grant, and the right of petitioner to sue the majority of the Court of Appeals followed the majority opinion on the former appeal, 81 F. (2d) 986. (R. 848-873, 91 F. (2d) 665). On these questions Judge Soper again dissented, holding that the additional evidence taken upon the retrial strongly supported the conclusions on which his former dissent was based. (R. 873-8).

MATERIAL FACTS

The petitioner is a public utility corporation generating and selling electric power in South Carolina at rates approved by the Public Service Commission of that State. It is the only power company doing business in Greenwood County, South Carolina, and surrounding counties.

On November 16, 1933, Greenwood County made application to the Federal Emergency Administration of Public Works for a loan and grant of federal funds under Title II of the National Industrial Recovery Act amounting to $2,627,197.00 for the construction of an electric power plant at a point known as Buzzard Roost on Saluda River in said County. This application stated that the rates to

be charged by the proposed Buzzard Roost plant were only slightly above the TVA rates which would be applied in Tupelo, Miss., and that the proposed plant would establish in the territory in which it would operate an economical electric service similar to that set up by the Tennessee Valley authority and would furnish a proper and fair "yardstick" or measure of the cost of hydro-electric power. (R. 267, Defendants' Exhibit 49, R. 712-3).

On this application being filed the petitioner's rates were investigated by the Federal Administrator and the conclusion was reached by him that the petitioner's rates were excessive. (R. 300, 654, 655, 660, 662-3). The rates of the proposed plant being materially lower than the petitioner's rates, the application met the required test of criteria of the Federal Administrator in passing upon applications for loans and grants for the construction of competing municipal power plants. Accordingly the application was approved by resolution of the Public Works Administration dated June 20, 1934, (R. 369, 464) which resolution included the plant in the so-called comprehensive program of public works and made the allotment by way of a grant and so-called loan for its construction as a federal public works project. The amount of the allotment was later increased to $2,852,000.00 by resolution dated November 7, 1934. (R. 368-9, 464-5).

The entire cost of the plant would be defrayed by the federal government: 30% of the cost would be an outright gift or subsidy, no part of which would ever have to be repaid; the balance of the cost would be repaid by a so-called loan secured by special revenue bonds, both the principal and interest of which would be repayable, if at all, only out of the prospective revenues of the plant. The County, itself, would make no investment in the plant and

would assume no liability or obligation of any character for its construction or operation. (R. 179, 199-200.)

The proposed plant would be a purely local enterprise operating in Greenwood County and in the two adjoining counties of Newberry and Laurens. It would engage in the general utility business of furnishing electric power to municipalities, industrial enterprises, private individuals and the public generally for domestic, industrial and commercial uses, and would operate in direct competition with petitioner. (R. 175).

We shall hereafter show in detail the criteria, standards or tests by which actions of the Federal Administrator were controlled in passing on applications for loans and gifts for local electric power plants, and that the lowering of rates was the controlling factor in the making of the loan and grant in the instant case.

As heretofore stated the business of the petitioner is subject to the jurisdiction and control of the Public Service Commission of South Carolina and its rates have been approved by that Commission as just and reasonable. The laws of that state require petitioner to maintain at all times adequate and efficient service and the Commission may at any time require such extensions and additions to existing facilities as may be necessary. Without the permission of the Commission the petitioner cannot abandon all or any part of its service to the public. (R. 123-124).

In order to serve the territory in which the petitioner does business, including the three counties in which the proposed project would operate, the petitioner has invested millions of dollars in equipment and operating facilities. These facilities are amply sufficient to meet the present requirements of this area and any demand reasonably to be expected in the future. In the three counties of Greenwood, Newberry, and Laurens, petitioner owns valuable

property, franchises and operating rights which are now used in serving these counties. (R. 168-172).

The customers to be served by the proposed plant would be those who are now, and for a number of years have been, served by the petitioner and the success of the proposed plant would depend upon the extent to which it could alienate petitioner's customers. The rates of the proposed plant have been fixed substantially below those of petitioner. The rate for wholesale service to municipalities is approximately 30% lower than petitioner's rate for this service; the rate to Industrial Consumers about 21% lower than petitioner's textile rate and about 25% lower than petitioner's rate to its industrial consumers; and the residential rate about 26% lower than petitioner's similar rate. (R. 558). These lower rates would be made possible by the federal subsidy and would be an essential part of the plan under which the plant would be constructed as a federal public works project. (R. 179, 199-200, 560-1, 643, 696).

Contracts have been made for the sale of practically the entire output of the proposed plant with consumers who are now and for a number of years have been customers of petitioner. (R. 340-1, 176-7, 314, 559, 691, 371-398). Each of these contracts is conditioned upon its approval by the Public Works Administration. (R. 371-98).

The effect of the construction of the plant as a federal public works project upon petitioner would be to force it to reduce its rates, deprive it of a large part of its business, and in large measure, to destroy the value of its property heretofore devoted to serving the public. In the three counties of Greenwood, Newberry and Laurens alone petitioner would sustain an annual loss in revenue of approximately $250,000.00 and the value of its property used for serving that territory would be seriously damaged if not destroyed. (R. 559-62, 565-6, 568-70).

Even if petitioner attempts for a while to hold out against the lower rates and accepts the loss of $250,000.00 annually in the Greenwood area the effect of the lower rates would be to force material reductions in petitioner's rates not only in that area, but also in the surrounding and adjacent territory in which it operates. (R. 561-2, 569).

The District Court dealt with the question of the "yardstick" regulation of the petitioner's rates by the proposed plant upon the theory that if the "yardstick" applied by the Buzzard Roost rates should be applied to the petitioner's rates by the regulatory Commission of South Carolina the petitioner could then complain; and that any complaint prior thereto would be premature. This same view was adopted by the Circuit Court of Appeals which pointed out that the rates of the proposed plant would not be a fair measure of the petitioner's rates because of the difference in the cost of construction, financing, etc. (R. 858). The District Court said:

> "We cannot assume that the South Carolina Public Service Commission or other regulatory body is going to stultify itself by failing to consider the major difference in the nature of the investment involved in the two plants.
>
> * * * Time will be to complain if after certain facts or yardsticks are ascertained, a regulatory body vested with the power seeks to apply such yardstick in an arbitrary, discriminatory and unjust manner. To justify the granting of an injunction on the yardstick theory of the case, the plaintiff must show this Court not merely that the proposed rates will supply the yardstick, or furnish from a friendly source information about the costs of producing electricity, but that this yardstick when once ascertained is about to be used by a regulatory body in an illegal manner." (R. 763-4).

Such a view entirely misconceives the theory as well as the operation of the PWA plan and ignores the actual coercive effect the subsidized plant would have upon the petitioner's rates as a practical matter. The theory of the PWA plan is that state control of rates through regulatory commissions has failed to accomplish the desired results and that therefore the more drastic and effective "yardstick" method of regulation is necessary. It has never been suggested that the "yardstick" method was designed or intended to operate through established legal channels or that it would furnish a lawful measure of rates to be legally applied by any duly constituted authority. The effectiveness of the plan and also one of the principal legal objections to it, lie in the fact that it operates outside of legal channels. The principal purpose of the "yardstick" method is to shortcut and supplant the established lawful method of regulating rates and to force reductions whether they are legally justified or not.

As to the petitioner's direct and certain loss of revenue in the Greenwood area, the respondents undertake to minimize this injury by pointing out the increase in petitioner's business which is created in other parts of the territory in which it does business, apparently attempting to offset the loss which petitioner will sustain in the Greenwood area by the increased business which it has been able to do elsewhere.

In the first place this contention of the respondents erroneously assumes that the petitioner would suffer no loss except that of $250,000.00 annually in the Greenwood area. In the second place it is no answer to the threatened injury to its business in that area to say that it has been able to increase its business elsewhere. Manifestly the petitioner has a legal right to the annual growth and extension of its business throughout different parts of the territory in which it operates. It may not lawfully be de-

prived of this right nor can such annual growth and extension be urged as justification for the destruction or injury of its business in any particular part of the territory in which it operates.

Further material facts will be stated in the appropriate place during the course of the subsequent argument.

SPECIFICATION OF ERRORS

Petitioner intends to urge the errors specified in its petition for a writ of certiorari (page 11 of the petition).

The errors specified raise 3 principle questions, as follows:

1. Whether the Circuit Court of Appeals erred in holding that, in the circumstances disclosed by the record, Title II of the National Industrial Recovery Act authorizes the action of the Public Works Administrator in making a loan and grant of federal funds to Greenwood County, South Carolina, for the construction of a local municipal electric utility as a federal public works project.

2. Whether the Circuit Court of Appeals erred in holding that Title II of the National Industrial Recovery Act (48 Stat. 200, et seq.), as applied to this case and as construed to authorize the action of the Public Works Administrator in making a loan and grant of federal funds to Greenwood County, South Carolina, for the construction of a local municipal electric utility, is constitutional, the error being that said statute as so applied and construed, is unconstitutional, in that:

(a). It is not within any power delegated to Congress by the general welfare clause, U. S. Constitution, Art. I, Sec. 8, Cl. 1, or by any other clause or provision of the U. S. Constitution; and is violative of the Tenth Amend-

ment to said Constitution, in that it invades powers and governs and controls matters reserved to the States.

(b). It unlawfully delegates legislative power to the executive department of the government, in violation of Art. I, Sec. 1, of the U. S. Constitution, and of the other provisions of said Constitution which prohibit the delegation of legislative power to the executive department.

(c). It deprives petitioner of its property without due process of law, in violation of the Fifth Amendment to the U. S. Constitution.

3. Whether the Circuit Court of Appeals erred in holding that, even if Title II of the National Industrial Recovery Act (48 Stat. 200, et seq.), as applied to this case, be unconstitutional, or the proposed action of the Federal Administrator be unauthorized by said Act, yet petitioners are not entitled to question the legality of said action even though their property and business will be irreparably damaged, if not destroyed, and their rates regulated and reduced by the proposed use of federal funds for the construction of said local electric utility.

SUMMARY OF ARGUMENT

The argument is directed to the questions above stated.

Petitioner contends that the action of the Administrator in approving the Buzzard Roost project and in alloting funds for its construction as a federal public works project was unauthorized by Title II of the National Industrial Recovery Act. The statute authorized the Federal Administrator to use the funds placed at his disposal only for the purpose of relieving unemployment; whereas the Buzzard Roost project was approved and funds allotted for its construction as a federal public works project pur-

suant to and in accordance with the PWA power plan to reduce local electric power rates.

The new contract of November 30, 1935, entered into between Greenwood County and the United States, in substitution of the prior contract of December 8, 1934, was merely in aid of and is dependent upon the original allotment of funds. Therefore, it did not cure the illegality of the allotment, but is subject to the same illegality as the allotment itself. The new contract did eliminate the provision contained in the prior contract requiring the County to adopt a rate resolution satisfactory to the Administrator. But rates satisfactory to the Administrator had already been adopted by the County, contracts for the sale of power from the project had already been made with petitioner's customers on the basis of these rates, and no change was made in either the rates or the contracts following the change in the loan and grant agreement. The change in the loan and grant agreement was a purely formal change, leaving the factual situation wholly unaffected.

Petitioner contends that if Title II of the National Industrial Recovery Act be construed to authorize the action of the Administrator in this case, said Act is unconstitutional, in that:

(a). The use of federal funds to control and reduce local electric rates is an attempt to achieve an end denied the Federal Government, and invades powers reserved to the states, in violation of the 10th Amendment.

(b). The use of federal funds to construct a local electric power plant at Greenwood, South Carolina, as proposed, is not within the power conferred upon Congress

by the General Welfare Clause, Art. I, Sec. 8, Cl. 1, or by any other clause or provision of the Constitution.

(c). The Act is an unconstitutional delegation of the power of Congress to spend for the general welfare.

(d). Petitioner will be deprived of its property without due process of law, in violation of the Fifth Amendment of the United States Constitution.

Petitioner contends that it is entitled to maintain this suit for the reasons that the action of the Administrator herein complained of will deprive petitioner of its customers and force it to make material reductions in its rates, thereby seriously injuring its property and business; that petitioner's business is a private property interest which the law will protect; and that because petitioner will be specially grieved by the unauthorized and illegal action of the Federal Administrator it is entitled to maintain this suit for an injunction against such action.

Petitioner contends that the foregoing questions should have been considered and determined upon the record made at the original hearing, and that the trial court should have rendered its decree on that record, because, the respondents having failed to establish the allegations of the motion on which the cause was remanded for retrial, the trial court erred in granting the respondents a rehearing of the original cause and in permitting them to introduce evidence in contradiction of the evidence taken on the original hearing.

ARGUMENT

I.

The evidence shows that the Buzzard Roost project was included in the comprehensive program of public works for construction under Title II of the National Industrial Recovery Act and that federal funds were allotted for its construction pursuant to the PWA power plan to reduce power rates.

Under this heading we shall attempt to demonstrate that the Administrator allotted funds for this particular project because of his emphatically expressed opinion that petitioner's rates were excessive; that his principle object in thus allotting said funds was to effect a reduction in power rates; and that his action in the instant case was in line with his general plan and power policy to make allotments for the construction of competing municipal power plants only when a reduction in local electric power rates would be thereby effected.

Mr. C. E. Rose was the only representative of the Public Works Administration who appeared as a witness on the original hearing, and, he then testified as follows:

> "The Duke Power Company will be the only competitor of the Buzzard Roost project, so *we estimated a rate schedule for the project* which would yield 6.5 mills for the industrial consumers of good load capacity, and 8.2 mills as a municipal rate, both of which are under the Duke rates. The Duke rates do not meet with the approval of the PWA authorities. *We think they are excessive, and it is because we think they are excessive that the PWA approved this grant.* That is one of the reasons for the approval of the grant. As to whether, if the Duke rates had met with the approval of the PWA authorities the loan and grant would have been approved,

> I can say that *we* (meaning PWA) *have never approved a project where a privately owned company has made a satisfactory adjustment.* That doesn't mean we will not. It is the policy of the PWA not to approve loans and grants where privately owned utilities have reduced their rates satisfactory to the PWA, and it was in line with that policy and because of that policy that I made the investigation as to the Duke rates." (R. 300). (Italics supplied).

The official statement of the power policy of the Public Works Administration issued by it on September 27, 1934, was introduced as Petitioner's Exhibit 35. This exhibit was an official statement issued by the Public Works Administration and quoted the Administrator himself on the subject of his power policy. The statement was produced by counsel for the Administrator from among the records of the Public Works Administration in response to notice by the Petitioner to produce the same. (R. 263). The statement appears on pages 361-3 of the record and reads in part as follows:

> "Achievement in certain instances of the administration purpose of making electric energy more widely available at cheaper rates today led to a clarification of the policy on power by the Public Works Administration.
>
> "Municipal or local publicly owned power projects will be aided by PWA only when, in addition to meeting those qualifications necessary for public works projects, they assure electricity to communities at rates substantially lower than otherwise obtainable under the unchanged basic policy enunciated by Public Works Administrator Ickes.
>
> * * *

"In all allotments made for municipal power plants by the Public Works Administration proposed rates have been well below existing private company rates. Consequently, the fact that the companies in some instances have met these proposed municipal rates has been deemed as showing progress toward one of the aims of this phase of the public works program."

* * *

Administrator Ickes said:

"PWA has endeavored to make electric energy more broadly available at cheaper rates by acting on applications of municipalities for loans and grants to finance municipal systems where reasonable security is offered and the project is socially desirable. They are deemed desirable where the loan can be amortized in a reasonable period while charging rates substantially lower than those of the existing utility.

"However, we make it a practice before approving the loan to give the company an opportunity to put in effect rates at least as low as those at which the municipal system will be self-liquidating.

* * *

"PWA will coöperate with cities to prevent rates rising on an indication municipal plants may not be built. PWA will not rescind allotments or suggest the withdrawal of applications until the lowered rates are legally in effect."

Secretary Ickes offered himself as a witness on the rehearing before Judge Watkins in December, 1935, and his testimony then given was, as stated above, used as a deposition on the retrial of the case before Judge Glenn.

His testimony was principally directed to the evidence taken on the original hearing. He said that Rose's testimony was not a correct statement of PWA policy, in so

far as it differed from his own testimony as to such policy then given on the rehearing; that Rose, though the only witness for PWA on the original hearing, "was not authorized to speak for the Public Works Administration with respect to anything, policy included" (R. 649); that the announcement of PWA power policy—released to the press in September, 1934, and produced on the original hearing by his counsel (R. 263, 361, Petitioner's Exhibit 35) —did not correctly set forth the policy "standing alone." (R. 651). In contradiction of the testimony of Rose and the statements in the official announcement of September, 1934, he declared that he had no interest in power rates, except "such interest as any bondholder would have" in lending money on revenue bonds. (R. 643).

On cross examination he said that on the County's application being filed he had had an investigation made of the Duke rates and came to the conclusion that they were excessive and that he still considered them excessive although he admitted that he had no facts on which to base this conclusion. (R. 654, 655). He stated that Mr. Rose was one of the PWA engineers who had investigated the Duke rates for him. (R. 654). He stated further that the Duke Power Company was one of the Public Utilities against which PWA had been directing its efforts in carrying out its program to reduce electric power rates. (R. 660). He testified further that he had recently published a book in which he had described the power plan and program of the Public Works Administration and that the description given in that book correctly stated the facts and that there had been no change in this power program or in its aims and purposes since the publication of the book. (R. 653, 656, 664).

For the sake of accuracy we quote the pertinent parts of the Administrator's testimony on these points, as follows:

"I recently published a book entitled 'Back to Work', with the sub-title 'The Story of PWA'. (R. 653).

"As to the statements contained in this book they are facts which I wrote as facts. The statements contained in the book are related as facts; that doesn't necessarily mean my own conclusions.

"On page 126 of the book referring to the construction of dams generally, I say: 'This activity is only the beginning of a national plan to increase the supply of electric power and to bring down its cost.'

"Ques. And that is the fact, is it not—the activities to which you are referring in your book, the construction of these plants, is part 'of a national plan 'to increase the supply of electric power,' and make it more widely available? Ans. Yes, I understand that the Administration is committing the crime of trying to decrease electric power rates. (R. 658).

"On page 134 of my book, I say this: 'This is the picture in broad outline of TVA, at the present time. Soon it is to be expected, the idea will be extended to other sections of the country. Moreover, TVA—and this is one of the main reasons for its establishment—will provide a "yardstick" for the measurement of similar rates in other parts of the Nation, with the result of forcing pretty generally a reduction of private utility charges.'

"On page 135 of the book I say: 'This TVA enterprise has appealed particularly to the public imagination because of its magnitude and on account of the broad social concept that underlies it. Yet this is not the only front upon which the government, under its PWA program, has been advancing against those utility interests that have been exacting unconscionable tribute from the people of the United States for so many years.'

"This quotation correctly states the facts as I believe them to be. It correctly states my views as I believe them to be.

"Ques. And among those 'utility interests that have been exacting unconscionable tribute from the people of the United States for so many years,' you would class the Duke Power Company? Ans. I agree with you in that.

"Ques. No, I asked you if you would not so class the Duke Power Company? Ans. Yes. (R. 659-660).

"On page 136, referring to loans and grants to municipalities for the construction of municipal plants I say, 'Finally we have always given the private utility an opportunity to meet the City's proposed rates, and if this is done, the City is afforded a second chance to lower still further its anticipated charges.' (R. 661).

"In my book I refer to the accomplishments of PWA and state that it has saved to consumers millions of dollars 'through the lowering of rates by private utilities to meet the charges proposed by applicants for public power projects.'

"I say, 'The rejection or withdrawal of some of the 200 applications that PWA did not approve was the result of this reduction of rates by the private companies to a point where there seemed no necessity or justification for a municipal plant.'

"Then on the next page I say, 'These "Yardsticks" provided by both municipal and Federal enterprises are so valuable that they alone would warrant PWA's expenditures for power undertakings. The municipal projects have caused private utilities to adjust their rates downward in wide areas and the Federal projects have brought about rate adjustments over still larger expanses of territory.' This quotation correctly states the facts. (R. 663).

"Ques. Now, Mr. Ickes, what I have read from your book correctly states the Public Works Administration's national power policy, as applied to all loans and grants for power projects, does it not? Ans. The Public Works Administration's policy is incorporated in the passages that you have read.

"There has been no change in that policy, as stated in my book, since August 26, 1935, when the final decree was entered in this case, and no change in my purposes and aims as Federal Emergency Administrator in carrying out that policy. (R. 664). Since the date of the entry of the final decree in this case there has been no change in the policy of the Public Works Administration. Since the date of the entry of the final decree in this case there has been no change in the aims and purposes of the Public Works Administration with respect to power—electric power. (R. 656).

"I charged in my book that the Duke rates were unreasonable because I believed it. The unreasonableness of the rates was the concern of any individual; especially the concern of a government official in my position. (R. 654).

"On page 143 of my book, I state, referring to the County project 'The fact is that it was proposed to distribute more than 80% of the power to be developed at Buzzard's Roost to new industrial and rural customers at a reasonable rate, something the Duke Power Company does not seem to be able to do.' I meant to say there that the Duke Power Company's rates are not reasonable and I think I say so quite plainly. (R. 654).

"When I referred in the book to 'the injustice of levying enormous tribute upon the people' I was referring to the rates which the Duke Power Company was charging its customers. That's the tribute. I have already answered the question as to what facts I had

upon which to base the charge in my book that the tribute was enormous and unjust. I have already stated, in response to the question, that I had reason to believe that the rates charged by the Duke Power Company were excessive; based upon the cost of production.

"* * * I have admitted that I had no facts. I acted on information and belief. * * * I still believe they are unreasonable based upon information and belief." (R. 655).

We turn now to the additional evidence taken on the retrial before Judge Glenn. We shall avoid a detailed recitation and indicate only its general character. This evidence related to acts of PWA officials in dealing with other applications for loans and grants for the establishment of similar municipal power projects to be operated in competition with privately owned utilities. The evidence relates to letters written and statements made by such officials in the course of their dealings with such applications. This evidence, we submit, shows that it was the general policy of the Public Works Administration, either by the threatened or actual use of federal funds, to bring about reductions in power rates which were considered too high by the PWA.

Mr. Frank T. Post, of Spokane, Wash., President of the Washington Water Power Co., testified as to his negotiations with the Public Works Administration in regard to the loan and grant to Coeur d'Alene, Idaho, for the establishment of a municipal power project to be operated in competition with his company. This was the loan and grant involved in the case of Washington Water Power Co. v. City of Coeur d'Alene, 9 Fed. Supp. 263. The loan was to be secured, not by revenue bonds, but by general obligation bonds of the City. Mr. Post wired the Administrator protesting against the loan and grant. In reply he

received a telegram from the Administrator himself, dated November 12, 1934, in which the Administrator advised Mr. Post that the city proposed to put into effect rates 20% below the rates of the Power Company, that the Power Company had already had an opportunity to meet the city's proposal but that if the Company would place in effect a rate reduction equal to or greater than the city's proposed reduction the Electric Power Board of Review of the Public Works Administration would consider further the Power Company's protest. (R. 578). The matter was referred to the Electric Power Board of Review of which Mr. Henry T. Hunt was chairman. The correspondence between Mr. Hunt and Mr. Post was introduced in evidence; the purport of which may be indicated by the statement in Mr. Hunt's letter of November 26, 1934, that:

> "You state that the original application contains no proposal of a reduction in rates. However, Mayor Coe conferred here with Mr. O. M. Rau of this Board and with me, and we advised him that a substantial reduction in rates would be required." (R. 580).

It will be recalled that the Administrator testified that he had no interest in power rates except the interest of a banker lending money on revenue bonds and therefore was not concerned with rates when the bonds were general obligation bonds. The bonds in the case of Coeur d'Alene were general obligation bonds.

Mr. Edwin Vennard, of Evanston, Ill., testified that he was a rate expert representing about 30 operating electric companies located throughout the middle west; that he had a great many conferences with the Electric Power Board of Review concerning municipal power projects in cities and towns served by his companies; that he had conferred with all the members of the Board but particularly

with Mr. Hunt, chairman, and Mr. Rau, rate expert, and that these conferences related to 25 or 30 PWA projects distributed throughout about 10 states in the middle west. He said that some of these projects involved general obligation bonds and that no difference was made by the Public Works Administration in passing upon applications for loans and grants whether they were based upon general obligation bonds or revenue bonds; and that in all cases rates were the determining factor with the Public Works Administration. He said that the Public Works Administration took the position that rates generally were too high and should be reduced; that the procedure was that the protesting utility was given an opportunity to put into effect a rate at least equal to or lower than the proposed municipal rate and that if this was done the application for loan and grant was rejected unless the municipality came back with a still lower rate, in which event the application was reconsidered and the utility company given another opportunity to make a further reduction. (R. 593-4).

He said that one of the tests applied by the Public Works Administration was the so-called "social desirability" test. On this point he testified on cross-examination by counsel for the Administrator: "The question of the project being self-liquidating and the question of social desirability were separate and distinct questions. The question of social desirability was whether or not the rate of the municipal plant was lower than ours or ours lower than theirs. That was the test—the cheapest rate to the customer. That was not my idea. Social desirability was their term." (R. 604).

The correctness of Mr. Vennard's testimony cannot be disputed. It is confirmed by numerous letters and telegrams which he received from PWA. These letters and telegrams were introduced in evidence and appear in the

record as a part of Mr. Vennard's testimony. (R. 595-602).

Mr. D. E. Byerley, of Adrian, Mich., President and General Manager of the Citizens Light & Power Company, gave testimony to the same effect with reference to his dealings with the Public Works Administration with regard to the establishment of competing municipal projects in towns served by his company. (R. 606). His testimony was also corroborated and confirmed by his correspondence with PWA.

Mr. George H. Carter, of Marlin, Texas, a Director of the Texas Utilities Company, and the attorney for that company, testified that he represented his company in opposing the PWA loan and grant for the establishment of a municipal plant in Marlin in competition with his company. Col. Carter's dealings were with Mr. Hunt and Mr. Rau of the Electric Power Board of Review and also with Major Fleming who at that time was deputy administrator of Public Works. Col. Carter's testimony as to his dealing with PWA is to the same effect as the testimony of the other witnesses. It shows beyond the slightest doubt that in the establishment of competing municipal plants, the matter of rates was the controlling consideration with the Public Works Administration. Col. Carter testified that he had never heard of the Electric Power Board of Review and didn't know there was one until he received a telegram dated August 18, 1934, signed "H. T. Hunt, Chairman, Electric Power Board of Review, for the Administrator," reading as follows:

> "Reference project Marlin Electric System. Suggest you inform client this Board wishes ascertain whether company will place in effect rates less than those offered by municipality. Possibly its representative will call on me here promptly in order that this matter may be determined." (R. 611).

Prior to that time he had filed a protest in December, 1933, with the State PWA Advisory Board in Fort Worth. He said: "I argued the protest before the Advisory Board and then went back home. I heard nothing more and didn't know what had become of it. The next thing I heard was on August 18, 1934, when I received this telegram from Col. Henry T. Hunt." (R. 618). It was in response to this telegram that Col. Carter later went to Washington and had the dealings with the Public Works Administration about which he testified.

A number of letters were introduced between Col. Hunt and Mr. T. O. Kennedy, Vice-President and General Manager of the Ohio Public Service Company (R. 619-24); also a number of letters between Mr. Hunt and Miles Cary, Vice-President and General Manager of the Public Service Company of Orlando, Fla. (R. 624-7). These letters all relate to PWA loans and grants for the establishment of competing municipal plants. Like the testimony they show that whatever may have been the theory of the statute yet, as actually administered by PWA in the case of loans and grants for the establishment of power plants, the test applied was that such plants would be established only where their rates would serve as a "Yardstick" to further the PWA policy to bring about the reduction of electric power rates, and that where the private utility whose rates would be affected agreed to put into effect rates as low or lower than the rates of the proposed plant the loan and grant was not made.

The petitioner introduced in evidence a number of orders, instructions and other documents issued by the Public Works Administration showing the PWA power plan. (R. 702-12). For example, Petitioner's Exhibit No. 49 is a letter dated November 8, 1933, from H. M. Waite, Deputy Administrator, to the PWA State Engineers. It contained the instruction to the State Engineers in regard

to handling applications for loans and grants for municipal light plants and, among other things, stated: "We are most anxious to set up around the country sound publicly owned utilities as yardsticks to determine the principle of whether or not communities can satisfy themselves and give lowered rates of electricity." (R. 576).

Mr. Clark Foreman was introduced as a witness for the respondents. He testified that he became Director of the Power Division of the Public Works Administration on August 1, 1935, and that he had continued in that capacity. The loan and grant to Greenwood County had been made before he became connected with the Public Works Administration and he knew nothing about it of his own knowledge. He undertook to testify about several of the projects to which Mr. Vennard had referred in his testimony but he knew very little about them and, insofar as he was able to testify to facts, his testimony confirmed rather than contradicted the testimony of Mr. Vennard. For example: Mr. Vennard testified that in the case of Dowagiac, Mich., the application of that City for a loan and grant had been rejected when his company made a reduction in rates. Mr. Foreman testified that later the application was approved but it appeared that this was not done until after the City had made a further reduction in rates which Mr. Vennard's company had been unable to meet. (R. 605). The procedure therefore in the case of Dowagiac was in accordance with the usual procedure followed by PWA in establishing competing municipal power projects.

A letter from Mr. Foreman to Mr. John M. Wright, City Clerk of Eldon, Iowa, dated October 22, 1935, was introduced in evidence as Petitioner's Exhibit 74. (R. 702). It related to the application of the City of Eldon for a PWA loan and grant for a municipal light plant and was in line with the customary PWA power policy.

Upon the original hearing Judge Watkins found that it was the declared policy of the PWA in making appropriations for municipally owned power projects such as the Buzzard Roost that the enterprise so aided should sell power at rates below the rates of the privately owned utility "thereby in effect constituting the rates of the municipally owned project a yardstick to regulate and bring about a reduction of the rates of the priyately owned utility." (R. 122).

On the retrial Judge Glenn found that in making the allotment to Greenwood County and in entering into the contract with the County the Administrator had no purpose other than that set out in the Act of Congress and that the policy of the Public Works Administration is correctly set out in the Administrator's report to the United States Senate, Respondents Exhibit 70. (R. 788).

When this finding is read in the light of Judge Glenn's opinion on this feature of the case it will be seen that the finding is based upon a supposed change in the power plan of the Administrator subsequent to the approval of the instant project and the allotment of funds for its construction. This is shown by the following extract from the opinion of Judge Glenn:

> "This evidence does tend to show two things. In the first place it tends to show that certain agents of the Administrator as well as the Administrator himself were at first very bold in the statement of the criteria they used in approving certain projects and denying others. It does support the contention that the criterion generally used was whether or not it was necessary to build a new competitive plant in order to force down the rates in a given community.
>
> "In the second place as testified by the Administrator himself in Spartanburg before Judge Watkins (evidence which under stipulation is now before this Court as original evidence), there was a gradual

recognition that the continued use of such a plan or scheme would endanger the constitutionality, of the whole program. We might as well be frank about it, for it is clear that such decisions as Judge Watkins' original decision in this case and the opinion of the Circuit Court of Appeals in the Coeur d'Alene case created doubts in the Administrator's own mind as to the wisdom of going too far into the rate question. Repudiation of the original position is abundantly evidenced. To name the major pieces of evidence is simply to remind ourselves of the following:

A. The frank changes in the contracts;

B. The appearance and testimony of Mr. Ickes himself on the rehearing of this Duke case;

C. The restriction of the authority of the Electric Board of Review;

D. The rebuke given to its members;

E. Its final abolition and the memoranda repudiating the authority to make certain statements which had been made by this Board.

We mention all of this because it is plain that there was on original plan to allocate funds for competitive municipal projects largely on the basis of lowering the rates in a given community. If the existing utility lowered the rates voluntarily and was rendering adequate service there would be no need to build a competitive, duplicate plant. Regardless of its effect on the final decision of the case we think that the evidence in this regard is admissible and that it shows exactly what the plaintiff contends that it shows." (R. 773-4).

The foregoing is a clearcut statement by Judge Glenn that at the time of the authorization of the construction of the Buzzard Roost project as a federal public works project, and the allotment of funds for its construction, the lowering of power rates was the controlling considera-

tion on which the action of the Federal Administrator was based. We submit that the validity of the Administrator's action must be determined by the considerations which controlled that action at the time the action was taken and that any subsequent change in the Administrator's power plan or policy would not be material as it could have no retroactive effect upon the validity of his action in this case. In other words, the supposed change in the PWA policy could have no bearing whatever upon the action in the instant case which took place long prior to the supposed change.

Each of the pieces of evidence to which Judge Glenn referred as indicating a repudiation or change of the Administrator's original plan related to matters which occurred subsequent to the allotment of federal funds for the construction of this project, so that even if they did indicate a change of policy such change would be immaterial in passing upon the legality of the allotment. As a matter of fact an examination of the evidence to which Judge Glenn refers will show that it does not bear out the conclusion that there was any change in the Administrator's policy; and the Administrator himself repeatedly testified that there had been no such change (R. 656, 664). Judge Soper correctly summed up this phase of the case as follows:

> "It is true that since the decision of Judge Watkins in the court below, 10 F. Supp. 854, 12 F. Supp. 70, and the decision in Arkansas-Missouri Power Co. v. City of Kennett, 78 F. (2d) 911, which pointed out the illegality involved in the practices of the Administrator, an attempt has been made to repudiate the public statements concerning the policies of the Administration which had been frequently and publicly made by subordinate officials; but these statements conformed so closely to the announcements of the Administrator that the attempt to abandon them

amounts to little more than an expression of regret that what had been so widely proclaimed as a praiseworthy public policy had become a source of danger to the establishment of municipal power projects. The District Judge found that there was in fact a change in the policy of the Administrator after he became doubtful of the validity of his prior acts, but so far as the proposal of Greenwood County is concerned, there was no change that affects the finding of fact that it was approved because it met the requirement that it would bring down the rates of the established local utility." (R. 875-6).

For example, Respondents introduced in evidence a letter written by the Administrator to the Mayor of Coeur d'Alene, Idaho, in March, 1936, in which the Administrator undertook to explain his action in that case with reference to power rates and in which, among other things, in speaking of the attitude which had been manifested in the letters and telegrams in reference to the rates and service of the Washington Water Power Company, he said: "I reached the conclusion several months ago that that attitude was entirely unjustified and have completely repudiated and abandoned it." (R. 718).

The letter was a hearsay statement and manifestly a self-serving declaration in the nature of a legal argument. It was clearly inadmissible and should have been excluded on the objection of petitioner. (R. 640, 831). But in any event the letter confirms rather than weakens the position of petitioner as it is a clear acknowledgment of the fact that at the time of the making of the loan and grant to Greenwood County the Public Works Administration was pursuing the policy of making such loans and grants only when they would bring about a reduction of local electric power rates.

On the record now before the Court the conclusion that the lowering of rates was the controlling factor in the

making of the loan and grant is in no way dependent upon the testimony of Mr. Rose alone. While Secretary Ickes did undertake to repudiate Mr. Rose's authority to speak for PWA on questions of policy, yet he did not deny Mr. Rose's testimony on the questions of fact about which he testified; and Mr. Rose's testimony is now confirmed by the testimony of Messrs. Post, Vennard, Byerley and Carter, and by their correspondence, and the correspondence of Messrs. Kennedy and Cary with PWA.

Secretary Ickes admitted that Mr. Rose was one of the engineers who had investigated the Duke rates for PWA. (R. 654). He testified that the investigation led him to believe that the Duke rates were excessive and that he still considered them excessive. (R 654, 655, 660, 662-3).

He further testified that the government, "under its PWA program has been advancing against" certain utility interests whose rates were considered excessive and that the Duke Power is one of those interests. (R. 660). The PWA advance is, of course, by way of making loans and grants for the establishment of competing municipal plants, the effect of which would be to lower rates and to control competitive rates. Secretary Ickes made this abundantly clear in his testimony.

He said, among other things, "We have always given the private utility an opportunity to meet the city's proposed rates, and, if this is done, the city is afforded a second chance to lower still further its anticipated charges." (R. 661). He testified that the yardsticks set up by PWA "have caused private utilities to adjust their rates downward," and that the accomplishments of PWA have saved to consumers millions of dollars "through the lowering of rates by private utilities to meet the charges proposed by applicants for public power projects" (R. 663); that the "rejection and withdrawal of some of the 200 appli-

cations that PWA did not approve was the result of this reduction of rates by the private companies to a point where there seemed no necessity or justification for a municipal plant." (R. 663).

Counsel for respondents argue that the testimony given by the Administrator on the cross-examination consisted largely of statements read to him from a book which he had published. They argue that the book was written for public consumption and should not be taken too seriously. But Mr. Ickes, himself, testified that the statements in the book were correct and did correctly set forth the power policy of the Public Works Administration as applied to the use of federal funds for the establishment of municipal power projects. He further stated that there had been no change in that policy since the book was written. He, therefore, expressly adopted those statements and made them a part of his testimony in this case, and the testimony of Messrs. Post, Vennard, Byerly and Carter shows that the practice outlined in the Administrator's book was invariably followed.

II.

The evidence showing that the loan and grant in question was made as a part of the general plan to lower power rates was admissible.

The District Court admitted evidence relating to acts of PWA officials in dealing with other applications for loans and grants for the establishment of similar municipal power projects in competition with privately owned utilities and to letters written and statements made by such officials in the course of their dealings with such applications.

Respondents objected to this evidence upon the ground that it was irrelevant in that it related to other projects than the one involved in this suit.

The petitioner contends that it was the policy and general plan of the Public Works Administration to use the funds placed at its disposal by Title II of the National Industrial Recovery Act, so far as concerns the establishment of municipal power plants, so as to lower power rates, and that the loan and grant in question was made pursuant to this plan because petitioner's rates were considered excessive. It was therefore pertinent and material for petitioner to show the existence of such a plan.

The evidence introduced did, of course, refer to other municipal power projects, but these projects were not unrelated to the projects involved in this suit. They were all connected as parts of the same general plan, directed to the common end of lowering rates, and what was done in connection with applications for the establishment of other similar projects for the accomplishment of this end is of strong probative value in support of petitioner's contention in this case.

In Wigmore on Evidence (1904), § 102, the general principle involved is stated as follows:

> "The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done. A plan is not always carried out, but it is more or less likely to be carried out. The existence of the plan is always used in daily life as the basis of an inference to the act planned."

And in Sec. 104 the author says:

> "There is no situation in which a design to do an act would be irrelevant to show the doing of the act."

The existence of the PWA plan to lower rates has a special probative value in the instant case when taken in connection with the testimony of the Administrator that he considered petitioner's rates excessive and in connection with the testimony of Mr. Rose that the loan and grant

was made because petitioner's rates were considered excessive.

The existence of the plan being relevant to the case it was competent to prove its existence not only by statements of the PWA officials but by their acts and conduct in other similar cases in which the plan was carried out.

In Wigmore on Evidence, Sec. 103, it is stated:

> "The design or plan being assumed to be relevant, a common source of evidencing it is the conduct of the person, i.e., not express assertions of it but conduct circumstantially indicating it."

The rule, as stated by Wigmore, has been uniformly followed and applied by the Courts, U. S. v. Milwaukee Refrigerator Transit Co., 142 Fed. 247; National Novelty Import Co. v. Ellis, (Ark.) 220 S. W. 467; Hill v. Ansted National Bank, (W. Va.) 123 S. E. 417.

The respondents objected to the evidence on the further ground that the officials of PWA to whose acts and statements the evidence related had no authority to act for PWA or to make these statements.

This ground of objection, is, we think, equally untenable. The PWA officials in the transactions to which the evidence related were acting in the line of their duty. Most, if not all, of the letters, telegrams, and other wirtten statements which were introducted in evidence by petitioner were produced by counsel for the Administrator from the files of the records of the Public Works Administration in response to petitioner's notice to produce the same.

Col. Henry T. Hunt was Chairman of the Electric Power Board of Review. It was to this Board that the Administrator referred the Greenwood County application when

the petitioner's protest was filed (R. 463); and it was in response to the recommendation of this Board, as a result of the protest, that the allotment was increased. (R. 465). It was also to this Board that the Administrator referred the protest of the Washington Water Power Company against the allotment to the City of Coeur d'Alene. Attention has already been called to the Administrator's telegram to Mr. Post, President of that company, that if his company would place in effect a rate reduction equal to or greater than that of the City of Coeur d'Alene the Electric Power Board of Review would consider further the City's application for a loan and grant.

The transactions shown by the evidence related not merely to a few applications but to applications from almost every part of the United States. This fact, we submit, shows that the transactions in question must have taken place with the knowledge, acquiescence, and approval of the Administrator. Columbia Knickerbocker Trust Co. v. Abbott, 247 Fed. 833; Dierkes v. Hauxhurst Land Co., 79 Atl. 361 (N. J.); Moore v. Atlantic Coast Line Railroad Co., 135 S. E. 473 (S. C.) The record shows that in several cases, at least, including the instant case, Col. Hunt and the Electric Power Board of Review were acting not only with the knowledge but under specific direction of the Administrator. That those officials and representatives were in fact acting in accordance with the PWA power plan is shown by the fact that their actions and statements were in strict conformity with that plan as outlined and described by the Administrator in his book, which he testified correctly described that plan.

III.

Title II of the National Industrial Recovery Act properly construed does not authorize the action of the Public Works Administrator in this case.

The necessity of so construing an act of Congress as to prevent an impingement upon matters of local or state concern is strikingly illustrated by the recent case of National Labor Relations Board v. Jones and Laughlin Steel Co., 81 L. Ed. 563. In that case the court construed and limited the application of the National Labor Relations Act of 1935 so as to exclude any invasion of the reserved powers of the states over their local concerns. The Court said that unless so construed and limited in its application—

> "the act would necessarily fall by reason of the limitation upon the Federal power which inheres in the constitutional grant, as well as because of the explicit reservation of the Tenth Amendment. A. L. A. Schechter Poultry Corp. v. United States, 295 U. S. 495, 549, 550, 554, 79 L. Ed. 1570, 1590, 1592, 55 S. Ct. 837, 97 A. L. R. 947. The authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce among the several states' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our Federal system. Ibid."

Congress appropriated funds placed at the Administrator's disposal by Title II of the National Industrial Recovery Act for the purpose of relieving unemployment and provided for the creation of the Public Works Administration as an administrative agency to carry out that purpose. For the Administrator to use the funds thus placed at his disposal for the accomplishment of a purpose alto-

gether unrelated to the statutory purpose is wholly unauthorized.

Title II of the National Industrial Recovery Act first directs that the Administrator prepare a comprehensive program of public works. The Act then authorizes the Administrator to construct, finance, or aid in the construction or financing, of any project included in the program so prepared. The Administrator may make grants to states, municipalities and other public bodies up to 30% of the cost of labor and materials for the construction of any such project. The Act specifies that the fund at the Administrator's disposal shall be used "with a view to increasing employment quickly." The authority given the Administrator is restricted to this purpose and projects can properly be selected upon this basis alone. There is no authority given the Administrator to use the funds at his disposal for the purpose of reducing local electric rates and in so doing the Administrator went entirely outside of and exceeded the authority which had been given him.

The respondents argue that the petitioner's contention as to the PWA plan to lower rates goes only to the question of the personal motive of the Administrator in making this particular loan and grant and that official action which is otherwise valid is not rendered invalid by the personal intent or motive of the official performing the act. No such question, however, is here presented. The issue here presented relates not to whether the motives and purposes of the Administrator are good or bad, not to whether his action is prompted by any improper or oblique motive, not to a particular purpose or motive in one or more isolated cases, not to a casual or sporadic purpose; but to a purpose which is being followed pursuant to a general policy and fixed program designed to achieve certain definite ends. And the question is whether this policy and program is lawful; whether the achievement of these ends is with-

in the power of the Federal Government. And that it is the right and duty of the Courts to inquire into and determine a question of this character has been repeatedly decided, adversely to respondents' contention and contrary to the ruling of the court below.

In United States v. Butler, 297 U. S. 1, 68:

> "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted." Citing M'Culloch v. Md., 4 Wheat. 316, 423; Linder v. U. S., 268 U. S. 5, 17; Gibbons v. Ogden, 9 Wheat. 1, 199; Veazie Bank v. Fenno, 8 Wall. 533, 541; Bailey v. Drexel Furniture Co., 259 U. S. 20; Hill v. Wallace, 259 U. S. 44; United States v. Constantine, 296 U. S. 287.

In that case it was argued that the tax should be sustained under the admitted power of the Federal Government to tax, but the court said:

> "It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government. The tax, the appropriation of the funds raised and the direction for their disbursement, are but parts of the plan. They are but means to an unconstitutional end." (Loc. cit. 68).

And further:

> "The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible." (Loc. ct. 69).

In Fidelity & Deposit Co. v. Tafoya, 270 U. S. 426, 434, the court said:

> "* * * we assume in favor of the defendants that the state has the power and constitutional right arbitrarily to exclude the plaintiff without other reason

than that such is its will. But it has been held a great many times that the most absolute seeming rights are qualified, and in some circumstances become wrong. One of the most frequently recurring instances is when the so-called right is used as part of a scheme to accomplish a forbidden result."

The respondents contend that the PWA had no purpose to affect power rates. We submit, however, that the record demonstrates that the reduction of power rates was not simply an incidental effect of the PWA power program but was its direct objective and was the *sine qua non* of the instant loan and grant.

Respondents contend that the adoption by the Administrator of the rate test which they described as a "non-statutory criterion" did not render illegal the making of loans and grants which would in fact have the effect of relieving unemployment. Their argument is that a loan and grant which will have the effect or relieving unemployment and thus accomplishing the statutory purpose is in compliance with the statute and therefore lawful no matter what other factors the Administrator may have taken into consideration in determining to make such a loan and grant. They argue that since the loan and grant in question will have the effect of giving employment the Administrator "is doing precisely what the statute authorizes him to do," and that the fact that he "is acting pursuant to an additional 'non-statutory criterion'" does not make his action unlawful.

We may concede for the sake of the argument that the Administrator might apply some "non-statutory criteria" which would not make his action unlawful. But the "non-statutory criterion" here involved is not of that character. In making the lowering of rates the controlling factor in the approval or disapproval of loans and grants for the establishment of municipal power plants the Administrator

is acting entirely beyond the authority delegated to him. He is not merely applying criteria or standards which the statute does not require him to apply, but criteria or standards which it is unlawful for him to apply, both under the statute and under the Constitution.

Respondents construe the statute as if Congress had delegated to the Public Works Administration power to use the funds placed at its disposal not only for the purpose of relieving unemployment but for the accomplishment of *any other purpose* considered beneficial to the public interest. Had the statute been so written, it would have been unconstitutional as an invalid delegation of legislative power and so to construe and apply it would render it likewise unconstitutional. Had Congress provided that the funds placed at the Administrator's disposal should be spent not only "with a view to increasing employment," but also with a view to lowering electric power rates and that no loan and grant for the establishment of a municipal power project should be made unless it accomplished both purposes, the statute would have been unconstitutional as exceeding any power vested in Congress and as invading matters reserved to the states. Yet the administrative application and construction of the statute as applied to applications for loans and grants for the establishment of municipal power plants give the statute the same effect as if Congress had so provided.

Here there is no evidence in the record of what effect, if any, the loan and grant would have in relieving unemployment. But even if we concede that one of the purposes of the Administrator is the relief of unemployment yet since he is also acting to reduce rates, which admittedly he has no authority to do, and since his action will cause special injury to the petitioner, as admittedly it will, clearly his action is unlawful and the petitioner is entitled to have it restrained.

Respondents cited in the Court below a number of cases holding that the Courts, in reviewing an exercise of executive or administrative power, will not substitute their judgment for the judgment of the executive or administrative official whose action is under review. No such question is here involved. The question here is not whether the Court will substitute its judgment for the judgment of the Administrator, but whether the Administrator has acted outside the scope of the authority conferred on him. The statute conferred on the Administrator no authority to lower and control power rates or to regulate any other form of industry. No authority has been cited, and none can be cited, holding that an executive or administrative official charged with the duty of spending money for the national purpose of relieving unemployment may use the funds placed at his disposal to regulate any form of loca industry, and thus to invade matters reserved to the states.

The principle that an official will be enjoined from acting outside his authority has been frequently invoked and applies as well to official action of an executive character as to official action of a quasi-judicial or quasi-legislative character. Philadelphia Co. v. Stimson, 223 U. S. 605, at page 620, and cases cited.

In Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433, the plaintiff contended that the Interstate Commerce Commission had exceeded the power conferred upon it to determine whether a rate was just and reasonable, in that the Commission had assumed that it had power to fix rates upon its conception of public policy as to what was best for the shippers. The plaintiff further contended that the court would not be controlled by the mere form of an order of the Commission which superficially appeared to conform to the Commission's proper authority, but that the court would determine the validity of the order by what the Commission in fact did. Having

examined the Commission's action in this light the court said that "the order was void because it was made in consequence of the assumption by the Commission that it possessed the extreme powers which the railroad companies resist the order plainly manifested"—namely, the power to fix rates to protect the lumber interests to which the rates applied.

In A. T. & S. F. Rwy. Co. v. I. C. C., 190 Fed. 591, the rate on lemons moving from California and from western points to the East was fixed by the Commission on the assumption that it had the power "so to adjust railroad rates as would give to the American Industry protection against foreign competition." The court held that the power delegated to the Commission to fix rates "does not confer absolute or arbitrary power to act on any considerations which the Commission may deem best for the public, the shipper or the carrier. Its order must be based on transportation considerations." The court after analyzing the order held that the transportation considerations had been "a small, if not entirely insignificant, factor in the case" and that since the order was "based primarily on the assumed authority to protect the industry against foreign competition it must be held void as beyond the powers delegated to the Commission."

In Anchor Coal Co. v. United States, 25 Fed. (2d) 462, there was involved the validity of an order of the Interstate Commerce Commission directing carriers to cancel certain rate schedules which they had filed, reducing by 20¢ per ton the freight rate on "lake cargo" coal from the southern field to lake ports. The suit was brought by coal producers engaged in mining and shipping coal from the southern field to set aside the order, on the grounds that one of the factors taken into consideration by the Commission in entering the order was the equalization of the advantages which these producers had over their competitors in the northern field, that the ac-

tion of the Commission was based upon industrial conditions and hence constituted not merely a regulation of rates but a regulation of industrial conditions, and that the order was therefore in excess of the powers conferred on the Commission and void.

The Court held that, in considering the validity of the order, it was the duty of the Court *to go behind the formal order and to scrutinize the record for the purpose of ascertaining the real nature and character of the Commission's action.*

It said:

> "To understand, however, exactly what the power is which the Commission has assumed to exercise, it is necessary that *we go behind its merely formal conclusion that rates are reasonable or unreasonable, and ascertain exactly what it is that it has done, and upon what facts and upon the application of what principles it has arrived at its conclusions.* This it is our duty to do. Southern Pacific Co. v. Interstate Commerce Commission, 219 U. S. 433, 31 S. Ct. 288, 55 L. Ed. 283; U. S. v. N. Y. Central Railroad, 263 U. S. 603, 44 S. Ct. 212, 68 L. Ed. 470. And, in the performance of this duty, it is necessary that we analyze not only the report of the Commission accompanying the order whose enforcement we are asked to enjoin, but also the reports made in 1925 and 1927 with regard to the reductions of rates from the Northern field, in the latter of which the differential between the two fields was increased from 25 to 45 cents." (Italics supplied).

After analyzing the record the Court said that it was manifest that the order of the Commission was a—

> *"regulation of industrial conditions under the guise of regulating rates.* It means nothing more nor less than that, because one community is able to produce coal more cheaply than another, and thereby get a large share of the business which has been going to the other, even though paying a considerable differential in freight, the Commission is placing upon it a handicap by increasing the

differential in rates and thereby equalizing the advantage which it has in a low cost of production. It matters not what this may be called, it is in essence a regulation of industrial conditions through manipulation of rates." (Italics supplied).

It said further:

"We think that the enforcement of the order here complained of should be enjoined: (1) *Because the Commission exceeded its powers, in that its action was based, in part, at least,* upon industrial conditions, and was essentially an effort to equalize industrial conditions or offset economic advantages through adjustment of rates." (Italics supplied).

It further said:

"If we are correct in our analysis of the reports of the Commission, there can be no doubt that it exceeded its powers.

"As pointed out above, for the Commission to fix rates upon such a basis is for it to assume the task of equalizing industrial conditions through rate adjustments. We do not think that Congress could give such power to the Commission. Hammer v. Dagenhart, 247 U. S. 251, 38 S. Ct. 529, 62 L. Ed. 1101, 3 A.L.R. 649, Ann. Cas. 1918E, 724. We are perfectly certain that it has not attempted to do so."

Referring to the language of the Hoch-Smith Resolution under which the Commission purported to make the order in question, "to the effect that the conditions which prevail in industry should be considered in adjusting freight rates, to the end that commodities may freely move," the Court refused to construe this language as conferring the authority, which the Commission had claimed the power to exercise. On the contrary, it said:

"Congress certainly did not intend by this language to create in the Commission *an economic dictatorship* over the various sections of the country, with power to kill or make alive. If the Commission has the right in a

rate adjustment to consider the shift in traffic to a community already paying a higher rate, *and act upon it as one of the factors* in still further widening the rate differential, its power to control the economic development of the country is practically unlimited. The shift in cotton manufacturing, in fruit growing, in furniture manufacturing, in short in every branch of industry, will become a matter for consideration by the Commission; for all depend upon freight rates, * * * and all experience periods when there are shifts of traffic from one section to another, due to varying industrial conditions. *We feel perfectly certain that Congress did not intend to vest such power in the Commission.* (Italics supplied).

It will be noted that in the Anchor Coal Company case the order of the Commission was set aside, not on the ground that it was based entirely on the regulation of industrial conditions, but "because the Commission exceeded its powers, in that its action was *based, in part, at least,* upon industrial conditions." So in the case at bar the Administrator's action in approving the loan and grant would be void, even if it were based only in part on the regulation of electric power rates, but the evidence shows that the regulation of rates was in fact the controlling factor in determining the Administrator's action.

In reference to the action of the Administrator in this case Judge Soper said:

> "Possessing the conviction that the rates approved by State authority were too high, he determined to use his power as an official of the national government to reduce them; and in carrying his purpose into effect he stepped across the line, went beyond the power conferred upon him by Congress and invaded the reserved powers of the states. If the National Industrial Recovery Act had provided that the power of the Administrator to make loans or grants to municipalities for the establishment of power plants should be exercised so as to reduce by competition the rates of private utilities approved by state authority, such a provision would surely have been unconstitutional. The administrator proceeded as of such a provision were contained in the statute." (R. 876-7).

It is a familiar principle that, although the courts will not review the discretion of an administrative official, exercised within the scope of his authority, they will grant relief if he applies rules and principles which are not authorized by the statute under which he purports to act. For instance, in St. Louis O'Fallon Rwy. Co. v. United States, 279 U. S. 461, the Interstate Commerce Commission followed a principle of valuation not in accord with the statute. Although the Commission had vast discretion in the matter of valuation it was held that its order must be set aside. In American Bank & Trust Co. v. Federal Reserve Bank, 256 U. S. 350, it was held that the admitted power of the Federal Reserve Bank to present checks to the drawee bank for payment could not be used, pursuant to a policy established by the Federal Reserve Bank, for the purpose of compelling the drawee banks to join the Federal Reserve System. In this connection we also refer to the case of Work v. Louisiana, 269 U. S. 200, Herkness v. Irion, 278 U. S. 92; Florida East Coast Rwy. Co. v. United States, 234 U. S. 167; and Central Railway Co. v. United States, 257 U. S. 247.

The use of the spending power of the Federal Government to control power rates is merely "an entering wedge." The principle for which counsel for the Administrator contend, when once established, would authorize the use of the spending power for the control of any and all other forms of industry which it might be considered advisable to control. The fact that the control of power rates is here being exercised under a statute appropriating money for the avowed national purpose of relieving unemployment is wholly immaterial if the contentions of counsel for the Administrator be accepted. For if money appropriated for such a statutory purpose may be used for any other purpose deemed desirable, or if a party specially injured has no standing in Court to question the validity of such a use of the spending power, then there is hardly any form of industrial activity which cannot be sub-

jected to federal regulation and control. To say that we are faced with such a problem is not an exaggeration in view of the increased use of the federal spending power and the claims being made for its scope.

A construction of the statute which would deny to the Administrator the powers claimed in his behalf in this case would not impair the federal spending power in its use for any legitimate national purpose. To construe the statute, however, so as to uphold the contentions of counsel for the Administrator would, to say the least, raise grave questions as to the constitutionality of the statute as so construed and applied. And the rule is well settled that "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U. S. 394, 401; Harriman v. Interstate Commerce Commission, 211 U. S. 407, 422; Texas v. Eastern Texas R. Co., 258 U. S. 204, 217; The Abby Dodge, 223 U. S. 166, 175; United States ex rel. Atty. Gen. v. Delaware & H. Co., 213 U. S. 366, 407; Knights Templars' & M. Life Indem. Co. v. Jarman, 187 U. S. 197, 205; McCullough v. Virginia, 172 U. S. 102; United States v. Coombs, 12 Pet. 72, 76.

IV.

The new contract of November 30, 1935, entered into in substitution for the prior contract of December 8, 1934, did not cure the illegality of the original allotment of federal funds for the construction of the Buzzard Roost project, nor did it otherwise make any material change in the case.

The contract of December 8, 1934, in existence between the Administrator and Greenwood County at the time of the entry of the original decree of injunction provided that the County should adopt a rate resolution satisfactory to the Administrator. The new contract of November 30,

1935, eliminated this provision. But rates satisfactory to the PWA had already been adopted by the County, contracts for the sale of power from the project had already been made with the petitioner's customers on the basis of these rates and no change was made in either the rates or the contracts following the change in the loan and grant agreement. The change in the contract, therefore, was a purely formal change made by a scrivener and the factual situation remains wholly unaffected. No change was made in the allotment of federal funds, in the project, in its rates, or in the effect that the allotment would have in reducing power rates or in the injury that would be done to petitioner. (R. 563, 688, 691).

There was no new application by the County to the Public Works Administration and no new resolution or allotment of federal funds by PWA.

The new contract was based on the original PWA resolution of June 20, 1934, whereby the project was included in the so-called comprehensive program of public works and funds allotted for its construction as a public works project. The new contract, like the prior contract, was merely a routine detail for the carrying out of the original allotment or resolution; each of the contracts simply providing for the disbursement of the funds allotted by the resolution.

The resolution was the vital and controlling act on which the validity of the allotment depends. If as we have heretofore argued the original allotment was illegal, then the contract which is merely in aid of the allotment could not cure the illegality of the allotment but is affected by the same illegality and subject to the same infirmities as the resolution itself. Horbach v. Coyle, 2 Fed. (2d) 702, 707; 6 R. C. L. p. 820; 13 C J. 511.

The correctness of the following statement, although taken from the dissenting opinion, is not questioned:

> "The original contract of December 8, 1934, was revised on November 30, 1935, so as to include a paragraph denying to the Administrator and the Government the right or power to govern the rates to be fixed or charged for the services afforded by the project, excepting such rights as the Government might have as a holder of the municipal revenue bonds; but no new application for the loan and grant was made by the county, no new resolution of approval of the project by the Public Works Administration was given, and no change was made in the rates to be charged by the projected plant which had been adopted prior to the execution of the first contract and had received the approval of the Administrator. In fact, the county adopted a new resolution on December 6, 1935, by which the original rates were confirmed. The change in the contract was obviously made to meet, if possible, the legal objection that had been raised; but no change was made in the unauthorized and invalid condition upon which the proposal had been approved." (R. 876).

The resolution of June 20, 1934, approving the County's application of November 16, 1933, provided that the Administrator "include in the comprehensive program a project for the construction of an hydro-electric plant comprising an earthen dam across Saluda River, * * * by Greenwood County, South Carolina, substantially in accord with Docket No. 3972 and allot a sum not to exceed $2,767,000.00 for the purpose of aiding by way of a loan and grant the financing of such project subject to the execution of a contract satisfactory to the Administrator between the United States of America and Greenwood County." (R. 464). This resolution was later reaffirmed

and the amount of the allotment increased to $2,852,000.00 by similar resolution dated November 7, 1934. (R. 46-5).

The Administrator's authority to use federal funds for the construction of the project is limited to the project approved by the resolution above quoted and depends upon that resolution. As we have heretofore pointed out, the statute under which the Administrator purported to act directed that he prepare a "comprehensive program of public works" and authorized him to allot funds for the construction only of projects included in such program. Except as the Buzzard Roost project has been included in such a program the Administrator would be without even colorable authority to use federal funds for its construction. And the action upon which the Administrator relies for the inclusion of this project in the so-called comprehensive program is the resolution above quoted. It is the source of whatever authority the Administrator claims to have to use federal funds for the Buzzard Roost project. The subsequent contracts were merely details connected with the distribution of the allotted funds.

It is true that the contract of November 30, 1935, provides, in effect, that the Administrator shall have no rights in respect to rates except those of a bondholder. Laying to one side the obvious purpose for which these provisions were inserted, we submit, that they must be read in connection with the provision of the South Carolina Act under which the bonds would be issued. This Act (Act No. 299 of the Acts of 1933, § 29) expressly provides that the rates to be charged "shall not be subject to supervision or regulation by any state bureau, board, commission or other like instrumentality or agency thereof." Under the Act the only control imposed upon the County with respect to rates is the power given the holder of the bonds to require that the rates be so fixed as to be sufficient to liquidate the bonds. Under the PWA plan of financing this

plant however there is no possibility that the holder of the bonds would ever take any action interfering with the plan to maintain rates substantially below the rates of the petitioner. The maintenance of such rates is a necessary condition of the method of financing, even apart from the federal subsidy, for the bonds being payable solely out of the revenues of the plant the rates must be kept below petitioner's rates else there would be no revenue out of which to pay any part of the principal or interest. (R. 560-1, 696, 643).

It would be impossible to contrive a yardstick more effective in its consequences. No matter what reductions the petitioner might make in its rates, the project would always go still lower. Therefore the provision as to rates incorporated in the earlier contract was wholly unnecessary to effectuate the PWA policy of lowering rates, because under the circumstances the loan and grant itself, as made in this case, would necessarily have that effect.

In many cases the objective of the PWA plan was accomplished without the construction of any municipal plant at all and in such cases there was, of course, no contract—and manifestly no relief of unemployment. This occurred when the private utility agreed to put into effect a lower rate than the rate of the proposed municipal plant. This working of the plan is demonstrated by the Administrator in his testimony as follows:

> "In my book I refer to the accomplishments of PWA and state that it has saved to consumers millions of dollars through the lowering of rates by private utilities to meet the charges proposed by applicants for public power projects.'
>
> "I say 'the rejection or withdrawal of some of the 200 applications that PWA did not approve was the result of this reduction of rates by the private companies to a point where there seemed no necessity or justification for a municipal plant.'

> "Then on the next page, I say: 'these "Yardsticks" provided by both municipal and federal enterprises are so valuable that they alone would warrant PWA's expenditures for power undertakings. The municipal projects have caused private utilities to adjust their rates downward in wide areas and the federal projects have brought about rate adjustments over still larger expanses of territory.' This quotation correctly states the facts." (R. 663).

It is significant that the sole ground upon which the Federal Administrator requested the remand of this case for a retrial was the substitution of the contract of November 30, 1935, for the prior contract of December 8, 1934, the motion of the Administrator alleging:

> "The terms and conditions which were contained in the original contract of December 8, 1934, and which were held by the District Court to have been in excess of the power and authority of Greenwood County under the laws of South Carolina are not contained in the new contract of November 30, 1934." (R. 493).

This allegation is wholly incorrect. The Administrator made no effort on the retrial to support it and it is insupportable. Judge Watkins did not hold the terms and conditions of the contract of December 8, 1934, to be in excess of the authority of the County under the laws of South Carolina. On the contrary he expressly held that all questions of state law had been conclusively settled in favor of Greenwood County by the decision of the Supreme Court of South Carolina in the case of Park v. Greenwood County, 174 S. C. 35. (R. 125). Judge Watkins' decision, on which the decree of injunction was based, was placed solely on federal grounds. (R. 117-152).

V.

If Title II of the National Industrial Recovery Act be construed to authorize the action of the Public Works Administrator herein it is unconstitutional in that it invades powers and governs matters reserved to the states in violation of the 10th Amendment to the United States Constitution.

Under a preceeding division of this brief, we have contended that the Act itself did not authorize the action of the Administrator in this case. If, however, it be held that the Act is broad enough to authorize such action of the Administrator then we contend that the Act itself is unconstitutional.

In *Collins v. New Hampshire*, 171 U. S. 30, 33-33; 43 L. Ed. 60, 61, the Court said:

> "The direct and necessary result of a statute must be taken into consideration when deciding as to its validity, even if that result is not in so many words either enacted or distinctly provided for. *In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.* Henderson v. Mayor of New York (Henderson v. Wickham), 92 U. S. 259, (23:543); Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health, 118 U. S. 455, at 462, (30:237, 241)." (Italics supplied).

In *Hammer v. Dagenhart*, 247 U. S. 251, 275, 62 L. Ed. 1101, 1107:

> *"A statute must be judged by its natural and reasonable effect.* Collins v. New Hampshire, 171 U. S. 30, 33, 34, 43 L. Ed. 60-62, 18 Sup. Ct. Rep. 768. The control by Congress over interstate commerce cannot authorize the exercise of authority not intrusted to it by the Constitution. Pipe Line Cases (United States v. Ohio Oil Co.) 234 U. S. 548, 560, 58 L. Ed. 1459, 1470, 34 Sup. Ct. Rep. 956. The maintenance of the authority of the states over matters purely local is as essential to the preser-

vation of our institutions as is the conservation of the supremacy of the Federal power in all matters intrusted to the nation by the Federal Constitution.

"In interpreting the Constitution it must never be forgotten that the nation is made up of states, to which are intrusted the powers of local government. And to them and to the people the powers not expressly delegated to the National Government are reserved. Lane County v. Oregon, 7 Wall. 71, 76, 19 L. Ed. 101, 104. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent, and has never been surrendered to the general government. New York v. Miln, 11 Pet. 102, 139, 9 L. Ed. 648, 662; Slaughter-House Cases, 16 Wall. 36, 63, 21 L. Ed. 394, 404." (Italics supplied).

We think it clear that the evidence now before the Court brings the case squarely within the principle of these authorities. It shows that according to the criteria, standards and tests adopted and applied by PWA no application for a loan and grant of federal funds for the construction of a municipal power plant in competition with a privately owned utility was approved unless the rates of the proposed plant would be materially lower than the rates of the private utility with which it would compete; that where the privately owned utility agreed to put into effect rates at least as low, or lower, than the rates of the proposed municipal plant the application was not approved; and that these criteria and tests were adopted by PWA pursuant to its announced power plan to bring about the reduction of power rates, and to establish municipal plants only where their rates would serve as "yardsticks" in bringing about lower rates. In the light of this evidence it is impossible to obscure the fact that the proposed use of federal funds will operate to lower and control intrastate electric power rates, and will constitute an invasion by federal authority of a field of government activity expressly reserved to the States.

In *Hammer v. Dagenhart*, 247 U. S. 251, 276, 62 L. Ed. 1101, 1107, from which we have already quoted, the Court further said:

> "This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, Federal and State, to the end that each may continue to discharge, harmoniously with the other, the duties intrusted to it by the Constitution."

In *United States v. Butler*, 297 U. S. 1, 80 L. Ed. 477, the Court while adopting Story's construction of the welfare clause in preference to Madison's more limited construction stressed the fact that "the adoption of the broader construction leaves the power to spend subject to limitations"; that it may only be exercised for a general not local, national not State, purpose. (297 U. S. 66-7). *And the Court expressly held that the federal spending power cannot lawfully be made the means of controlling matters of local concern, or of exercising powers reserved to the States.* (297 U. S. 68).

Mr. Justice Stone in his dissenting opinion said:

> "The power to tax and spend is not without Constitutional restraints. One restriction is that the purpose must be truly national. *Another is that it may not be used to coerce action left to state control.*" (297 U. S. 87). (Italics supplied).

For the federal spending power to be used so as to invade powers and perform the functions of the States would lead inevitably to the destruction of the federal balance between the general government and the States. A use of the federal spending power for such a purpose or, regardless of purpose, a use, which has that direct and necessary effect, is not a constitutional means of relieving unemployment.

The federal spending power like the other powers of the Federal Government must be exercised in the light of our dual system of government and our indestructible union of

indestructible states.* Story's Constitution, 3rd Ed., Sec. 416; U. S. v. Butler, 297 U. S. 1, 68. It must be exercised in a manner "consistent with the letter and spirit of the Constitution." McCulloch v. Maryland, 4 Wheat. 316, 421. And this prohibits any exercise of the power which would have the direct and necessary effect of invading the powers reserved to the States and impairing their separate existence and independent self-government. Kansas v. Colorado, 206 U. S. 46.

In *Franklin Township v. Tugwell*, 85 Fed. (2d) 208, 221, (which the government did not seek to have reviewed by this Court), the United States Circuit Court of Appeals for the District of Columbia, declared:

> "Thus we think it clear from the limitations placed upon the power of Congress to tax and spend for the general welfare that that power can never be used to destroy the federal balance established by the Constitution between the general government and the State, that that power may be exercised only within the limitations imposed by the Constitution, and not beyond, and that it cannot be directed to matters of local concern which belong exclusively to the States."

In *Carter v. Coal Company*, 298 U. S. 238, 295-6, 80 L. Ed. 1160, the Court said:

> "State powers can neither be appropriated on the one hand nor abdicated on the other. As this court said in Texas v. White, 7 Wall. 700, 725, 19 L. Ed. 227, 237, 'The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and

* This principle applies even more strictly to the federal spending power than to the other powers of the Federal Government, because the spending power, different from most of the other powers, involves only the power to spend, and, as Hamilton said does "not carry the power to do any other thing not authorized in the Constitution, either expressly or by implication." Hamilton's Works, (Const. Ed.), Vol. IV, p. 152.

the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.' Every journey to a forbidden end begins with the first step; and the danger of such a step by the Federal Government in the direction of taking over the powers of the States is that the end of the journey may find the states so despoiled of their powers, or—what may amount to the same thing—so relieved of the responsibilities which possession of the powers necessarily enjoins, as to reduce them to little more than geographical subdivisions of the national domain. It is safe to say that if, when the Constitution was under consideration, it had been thought that any such danger lurked behind its plain words, it would never have been ratified."

The question here is not whether the State of South Carolina has the right to adopt the policy, *as a State policy,* of establishing municipal power plants for the purpose of going into the power business in competition with private industry. The right of Greenwood County to engage in the proposed enterprise, notwithstanding the effect of the competition upon the business of petitioner, is not questioned. It may be conceded for present purposes—though it is not admitted—that the enterprise if established would be the business of the State and subject to its control. But the point, we submit, is not the right of the County to engage in the enterprise and to maintain it as a "yardstick," if it so desires; indeed, the decrees of Judge Watkins left the County entirely free to exercise this right and placed no obstacle in the way of the State's right to adopt and carry into effect such State policy with reference to power as it may see fit to adopt.

The petitioner complains not of State action but of federal action; not of lawful State regulation but of unlawful federal regulation; not of a State policy or program but of a federal policy and program, particularly of

that feature of it whereby privately owned utility companies are coerced into reducing their power rates. This is an end which cannot be achieved by the Federal Government by any means, because it is an end absolutely prohibited to that government. It cannot be achieved by employing, through an exercise of the spending power, rights which under the Constitution belong to the States alone and not to the Federal Government. It is no answer to say that the "yardstick" would be the County's "yardstick" when the very point at issue is whether the Federal Government may lawfully adopt, as a national power policy, a program for the establishment of such municipal "yardsticks" for the very purpose of reducing rates. In fact a part of the program, and one of its principal features, does not contemplate or result in the actual establishment of such "yardsticks" but coerces reductions in rates through the threat to subsidize their establishment. The fact that this federal regulation may be implemented by the purchased cooperation of the State subtracts nothing from its invalidity but merely makes the attempted encroachment on the principles involved stand out more clearly. There was do divergence of opinion in the Butler case on the principle that "the power to tax and spend is not without restraints"; and that one restriction is that "it may not be used to coerce action left to state control."

VI.

If Title II of the National Industrial Recovery Act, be construed to authorize the action of the Public Works Administrator herein, then the act is unconstitutional in that it is not within any power delegated to Congress by the General Welfare Clause, U. S. Constitution, Art. I, Sec. 8, Cl. 1, or by any other clause or provision of the U. S. Constitution.

The question here presented is whether the power of the Federal Government to levy taxes and to appropriate the revenues derived therefrom may lawfully be used to make an appropriation to a state, or to a political subdivision of a state, for the purpose of constructing a purely local public utility which as a matter of law could by no possibility serve any federal purpose. The appropriation would be made directly to Greenwood County, a political subdivision of the State of South Carolina. It is sought to be sustained on the ground that Greenwood County in expending the appropriation would employ in the construction of the plant persons who otherwise might remain unemployed, and would purchase materials and supplies from manufacturers who might employ such persons.

It cannot be denied that the construction of such a plant, apart from such incidental and collateral effect as its construction might have in relieving unemployment, is per se a matter of local, as distinguished from national, concern, and affects only the welfare of the state as distinguished from the welfare of the United States. It is a plain case of a State purpose. The cost of the construction of such a plant is a legitimate State expense and the power to levy taxes and to appropriate the revenues derived therefrom in order to defray such cost belongs to the several States and is expressly reserved to them and withheld from the Federal Government.

The proposition that the power of taxation and appropriation may only be exercised in furtherance of a public purpose will not be denied. Loan Association v. Topeka, 87 U. S. (20 Wall.) 655, 664; Parkersburg v. Brown, 106 U. S. 487; Cole v. City of La Grange, 113 U. S. 1; Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 161; Green v. Frazier, 253 U. S. 233, 238; Madisonville Traction Co. v. St. Bernard Mining Co., 196 U. S. 239, 251-2; Dodge v. Mission Township, (C. C. A. 8th), 107 Fed. 827; Lowell v. Boston, 111 Mass. 454. Nor can it be denied that the purpose must pertain to the government exercising the power. The federal power of taxation and appropriation may be exercised only for national purposes, and the like state power only for state purposes. What may be a public purpose of a State Government may not be a public purpose of the Federal Government; and to constitute a public purpose of the Federal Government it is not sufficient that the purpose be a public one from the standpoint of a State Government or of a municipality. Kohl v. United States, 91 U. S. 367; Cooley on Taxation 108; Hubbard v. Fitzsimmons, 57 Ohio State, 436; State ex rel. Owen, Attorney General, v. Donald, 160 Wis. 21, 151 N. W. 331, 365.

The construction of such a utility as the one proposed in this case, even so far as concerns the State of South Carolina, is a proprietary and not a governmental function. S. C. v. United States, 199 U. S. 437; Helvering v. Powers, 293 U. S. 214; United States v. California, 297 U. S. 175; Ohio v. Helvering, 292 U. S. 360; Los Angeles v. Los Angeles Gas Corporation, 251 U. S. 32. And certainly the construction of such a utility is not a public purpose of the Federal Government.

If an appropriation of federal funds to a state for such a purpose can be justified on the ground that the state's expenditure of the funds would have the effect of relieving

unemployment then it is difficult to imagine any appropriation of federal funds which could not be justified on some such similar ground, for if the relief of unemployment is a sufficient justification the relief of any other evil or undesirable conditions would do as well.

Here the benefits expected to arise from the expenditure by Greenwood County of the funds appropriated to it would be incidental to the exercise by the County, as a political subdivision of the state, of an admitted state power. If such incidental benefits justify federal appropriations to the states for the purpose of carrying out and performing purely state functions, then the federal government may make appropriations to states for the purpose of financing practically all state functions. There is scarcely any activity of the states, in the exercise of the powers reserved to them, which does not in a sense affect the general welfare in precisely the same way that the expenditure of these funds by the state would affect the general welfare by incidentally relieving unemployment. For example—and many examples might be cited—salaries and wages paid the state's officers increase the purchasing power of the nation, yet the number of officers and employees to be retained, the amount of their salaries and wages, and the payment thereof, are matters exclusively for the states.

There would also be precisely the same justification for any appropriation of federal funds, whether to an individual or to a private corporation, for any piece of construction work which would have the effect of relieving unemployment.

The importance of the principle involved is illustrated by the instant case. The necessary and inevitable effect of financing the establishment of the proposed plant, as a federal public works project, will be to lower and control

power rates in the territory in which the federally subsidized and financed plant will operate. By the use of federal funds, as here proposed, rates could be reduced to any desired level, dependent upon the amount of the federal subsidy and the plan of federal financing. If local power rates can be thus managed and the electric industry thus controlled, so also, in the same way, can the price of all other commodities be managed and all other lines of business controlled.

In *Cincinnati Soap Co. v. United States*, 57 Sup. Ct. 764, the question presented was whether an appropriation by Congress to the Treasury of the Philippine Islands was valid as a proper exercise of the federal spending power. The appropriation was upheld upon the ground that the Philippine Islands, as distinguished from a state of the Union, are a dependency of the United States; that the United States was under a moral obligation of the highest character to provide for the general welfare of the Philippine Islands; that such a moral obligation comes fairly within the term "debt" as used in the taxing clause authorizing Congress to levy taxes "to pay the debts of the United States"; and that the Federal Government may do for one of its dependencies whatever a state may do for itself or one of its political subdivisions, since over such a dependency the Federal Government possesses the sovereign powers of the general government plus the powers of a local or state government.

The opinion quoted with approval from United States v. Realty Company, 163 U. S. 427, as follows:

> "The nation, speaking broadly, owes a 'debt' to an individual when his claim grows out of general principles of right and justice,—when, in other words, it is based upon considerations of a moral or merely honorary nature, such as are binding on the con-

science or the honor of an individual, although the debt could obtain no recognition in a court of law. * * * * Payments to individuals not of right, or of a merely legal claim, but payments in the nature of a gratuity, yet having some feature of moral obligation to support them, have been made by the government, by virtue of acts of Congress appropriating the public money, ever since its foundation. Some of the acts were based upon considerations of pure charity. A long list of acts directing payments of the above general character is appended to the brief of one of the counsel for the defendants in error. The acts are referred to, not for the purpose of asserting their validity in all cases, but as evidence of what has been the practice of Congress since the adoption of the constitution."

The Court drew a clear distinction, however, between the power of Congress to make an appropriation to a dependency of the United States and the power of Congress to make an appropriation to one of the States of the Union.

On this point the Court said:

"It does not follow that because *a federal tax levied for the express purpose of paying the debts or providing for the welfare of a state might be invalid* (The Passenger Cases, 7 How. 283, 446) that such a tax for the uses of a territory or dependency would likewise be invalid. *A state,* except as the federal Constitution otherwise requires, *is supreme and independent. It has its own government, with full powers of taxation and full power to appropriate the revenues derived therefrom.* A dependency has no government but that of the United States, except in so far as the United States may permit. The national government may do for one of its dependencies whatever a state might do for itself or one of its political subdivisions, since over such a dependency the nation possesses the sovereign powers

> of the general government plus the powers of a local or a state government in all cases where legislation is possible."

In the *Passenger Cases*, 7 How. 283, 446, (cited in the above quotation), the Court said:

> "Nor has Congress power to lay taxes to pay the debts of a state, nor to provide by taxation for its general welfare."

In *Gibbons v. Ogden*, 9 Wheat. 1, 199, Chief Justice Marshall said:

> "Congress is not empowered to tax for those purposes which are within the exclusive province of the states."

In *Cooley on Taxation*, at page 108, Judge Cooley said:

> "State expenses are not to be provided for by federal taxation."

In *Cloud v. Coleman*, 64 Ky. 548, 588, the Court said:

> "Congress may levy and collect taxes for legitimate purposes of the National Government but not for the purposes of state governments."

In his *Lectures on the Constitution*, Mr. Justice Miller, at page 247, said:

> "The United States being a limited form of government, one of the restrictions to which it is subject is in regard to its power to levy taxes. The states may levy them for a great many purposes for which Congress cannot, because to the States belong all the powers not delegated to Congress."

The principle that an appropriation of public funds cannot be justified because of its indirect, incidental or collateral effect is especially applicable to Federal appropriations in order to avoid converting the Federal Government into one of unlimited powers. Loan Association v. Topeka, 87 U. S. (20 Wall.) 655, 665; Parkersburg v. Brown, 106

U. S. 487; Cole v. City of LaGrange, 113 U. S. 1; Dodge v. Mission Township, (C. C. A. 8th) 107 Fed. 827; Lowell v. Boston, 111 Mass. 454, 460-1; Cooley on Taxation, 108; Schechter Corporation v. U. S., 295 U. S. 495, 546-8; United States v. Butler, et al, 297 U. S. 1; Township of Franklin v. Tugwell, 85 Fed. (2d) 208; National Labor Relations Board v. Jones & Laughlin S. Corporation, 81 L. Ed. 563.

Charles C. Steward Machine Co. v. Davis, 57 S. Ct. 883 and Helvering v. Davis, 57 S. Ct. 904, are not authorities in support of the constitutional validity of Title II of the National Industrial Recovery Act as construed to authorize the action of the Public Works Administrator herein and as applied to this case. In those cases this Court upheld the Social Security Act which by Title II provided for the payment of old-age benefits; by Title III for unemployment compensation; by Title VIII imposed old-age benefit taxes in the form of an income tax on employees and of an excise tax on employers; and by Title IX imposed unemployment excise taxes on employers.

In those cases the unemployment compensation and old-age benefits which the Court upheld as legitimate means of relieving unemployment were wholly and immediately directed to the solution of that problem. And there is nothing in the decisions or in the opinions of the Court to warrant the conclusion that Congress has the power to make an appropriation for the construction of a state or municipally owned utility, which would serve only a local purpose, merely because the expenditure involved in the construction thereof might have the effect of increasing employment. On the contrary, the Court expressly stated that, "The line must still be drawn between one welfare and another, between particular and general"; that is to say,

between the welfare of the States and the welfare of the United States. Helvering v. Davis, supra.

In view of the statement in the unanimous opinion of the Court in the Cincinnati Soap Company case, drawing a distinction between the power of Congress to make an appropriation to a dependency of the United States and to make an appropriation to a State for a state purpose, there would be no warrant for construing anything said in the Social Security Act decisions—which were rendered only three weeks after the decision in the Cincinnati Soap Company case—as intended to apply to a case like the instant case. The Court itself, however, was careful to point out in the Social Security Cases that its ruling in those cases has no application to a question like the one presented here.

In the *Steward Machine Company case* the Court said:

> "In ruling as we do, we leave many questions open. * * * * In the tender of this credit *Congress does not intrude upon fields foreign to its function.* The purpose of its intervention, as we have shown, is to safeguard its own treasury and as an incident to that protection to place the states upon a footing of equal opportunity. Drains upon its own resources are to be checked; obstructions to the freedom of the states are to be leveled. It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or *to any other end legitimately national.* The Child Labor Tax Case, 259 U. S. 20, and Hill v. Wallace, 259 U. S. 44, were decided in the belief that the statutes there condemned were exposed to that reproach. Cf. United States v. Constantine, 296 U. S. 287. It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being ap-

proximate equivalents. In such circumstances, if in no others, inducement or persuasion does not go beyond the bounds of power. We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it. Definition more precise must abide the wisdom of the future."

In *Ashwander v. United States*, 297 U. S. 288, on which respondents rely, the contract involved was clearly within the federal power. The Wilson Dam and the power plant connected with it had been constructed for purposes of national defense and the improvement of navigation. Their construction was authorized by the National Defense Act of June 3, 1916. In authorizing the construction Congress was acting clearly within its war and commerce powers. (297 U. S. p. 326). The Court held that the water power and the electric energy generated at the dam being the property of the United States, "Authority to dispose of property constitutionally acquired by the United States is expressly granted to Congress by Sec. 3, Art. IV of the Constitution."

As to the means, which the government might employ in disposing of its property, the Court said *"we may assume that it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the States.* See Kansas v. Colorado, 206 U. S. 46, 51 L. Ed. 956, 27 S. Ct. 655, supra." (297 U. S. 338).

The Court held that the transmission lines to be purchased would provide a proper means of disposing of the electric energy. It said that the government had the same right to acquire the transmission lines as the means of conveying its electric energy to market as it would have to acquire mules or horses and equipment to carry silver to market from a silver mine owned by the government on its public domain; and said that "the acquisition of these lines raises no different constitutional question, (than would be raised in the sup-

posed case of the silver mine) *unless in some way there is an invasion of the rights reserved to the State or to the people.*" (297 U. S. p. 339).

The Court held that on the facts presented in that case, which concerned only the Wilson dam, and the disposition of the electric energy generated at the dam, that there was no basis for concluding that there was an invasion of the rights reserved to the States. It said, *"The government is not using the water power at the Wilson dam to establish any industry or business."* It said further, "The question here is simply as to the acquisition of the transmission lines as a facility for the disposal of that energy. And the government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in the operation of works constructed in the exercise of some power delegated to the United States."

VII.

Title II of the National Industrial Recovery Act is an unconstitutional delegation of the power of the Congress to spend for the general welfare.

It is fundamental that somewhere in the discretionary power delegated to executive or administrative officials there must be found an adequate standard to govern their action. If this standard is not expressly stated in the statute, it will, if possible, be found in the expressed purpose of the statute. Title II of the National Industrial Recovery Act contains no such standard except as it may be found in the declared purpose of the Act, to-wit: that the power delegated and the funds appropriated shall be used for the relief of unemployment. Unless the statute is construed so as to restrict the authority of the Federal Emergency Administration of Public Works and to prohibit it from using the funds placed at its disposal for any other purposes than the expressed statutory purpose of

relieving unemployment—as we have hereinbefore argued that it should be construed—then, we submit, that clearly it is an unlawful delegation of legislative power.

Whether, even if the statute be so construed and the power delegated be so restricted, it is nevertheless still subject to condemnation as an unconstitutional delegation of legislative power is discussed in the brief for the petitioner in Alabama Power Co., petitioner, v. Harold L. Ickes, Federal Emergency Administrator of Public Works, et al, respondents. (2 cases, 84 and 85). This feature of the case is there argued quite fully and further discussion of it by us would be needless repetition.

VIII.

Title II of the National Industrial Recovery Act, as applied to this case and as construed to authorize the action of the Public Works Administrator herein, deprives the petitioner of its property without due process of law in violation of the Fifth Amendment of the United States Constitution.

We think that this proposition follows as a matter of law from the propositions heretofore urged and that, therefore, it calls for no separate discussion. Willoughby, Constitutional Law (2nd Ed.), Sect. 1114; Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254; Louis K. Liggett Co. v. Baldridge, 278 U. S. 105, 73 L. Ed. 204.

IX.

The Petitioner is entitled to maintain this suit for an injunction against the illegal construction of said Buzzard Roost plant as a Federal Public Works project.

1. *The action of the Federal Administrator in including the Greenwood County project in the so-called comprehensive program of public works, and in allotting federal funds for the construction of the project under the provisions of Title II of the National Industrial Recovery Act, will be the proximate cause of the injury which petitioner will sustain.*

This was found as a fact by the District Court both on the original hearing and on the retrial. On the original hearing Judge Watkins found that the project would be constructed "solely through funds furnished by the Federal Emergency Administrator of Public Works," and that construction through any other source was not in the contemplation of the parties. (R. 122). On the retrial Judge Glenn found that, "While technically the Greenwood County authorities initially made the application they would never have had any shadow of a hope of financing such a project had it not been for the aid which was rendered by the federal government under the terms of the applicable statute. To contend otherwise is simply foolish in the face of the facts." (R. 785).

The South Carolina Statute, (Act No. 1095 of the Acts of 1934, 38 Stat. at L., 2020), authorizing the Finance Board of Greenwood County to borrow money from the Public Works Administration for the construction of the project, expressly declared that the project was to be self-liquidating, "and that any indebtedness or obligation created by the said Board shall not be a direct and primary obligation of the County of Greenwood."

Greenwood County will contribute nothing towards the construction of the plant and incur no liability for its con-

struction. The entire cost will be defrayed by funds furnished by the Federal Administrator. He will make the County an outright gift of 30% of the cost, and will supply the balance in the form of a so-called loan, no part of which, either the principal or interest, will be repayable except out of the earnings, if any, of the plant.

The injury to petitioner will be the inevitable result of the act of the Federal Administrator in authorizing the project,—a result necessarily contemplated at the time of the authorization. Rates were fixed below those of petitioner in order to attract petitioner's customers, and contracts subject to the Administrator's approval were made with petitioner's customers. The very conditions under which the loan is being made contemplate the taking of petitioner's business, and the repayment of the loan even in part necessitates the continuation of rates which will attract petitioner's business. The immediate loss of business will be in excess of $250,000 annually, and the continued operation of the plant at rates below petitioner's rates will force petitioner to make material reductions in its rates. (R. 558-63, 568-70).

It is well settled that a defendant is responsible for the consequences of his wrongful act which might reasonably have been foreseen. Milwaukee & St. Paul R. R. Co. v. Kellogg, 94 U. S. (4 Otto) 469. He is presumed to intend the natural and probable consequences of his acts, and when, as here, the injury is the result of such acts he cannot deny that he caused the injury.

The effect upon petitioner's rates and business was not only reasonably foreseeable but was in fact foreseen. The Administrator in authorizing the project intended that it should be constructed, that after its construction it should be operated in direct competition with petitioner, that it should charge rates substantially below petitioner's rates,

and that it should take business from petitioner. He knew that his act in authorizing the project and in allotting the funds for its construction, was calculated to damage petitioner, and would in fact damage it.

As heretofore pointed out petitioner is not complaining of competition by the County and a decree in favor of petitioner would leave the County free to compete with petitioner in any lawful way. What petitioner is complaining of, as we have heretofore stressed, is the action of the Administrator in including the Buzzard Roost project in the so-called comprehensive program of public works and in allotting federal funds for its construction as a federal public works project. Respondents nevertheless contend that the right of Greenwood County to compete with petitioner operates as a nonconductor breaking the chain of causation between the unlawful action of Administrator and the damage to petitioner. However should the plant be constructed its operation by the County in competition with petitioner would arise out of and be an immediate consequence of this action of the Administrator.

The rule that the construction of a municipal competing plant may be enjoined, if the construction would be illegally financed, as, for instance, by the issuance of bonds in violation of a constitutional or statutory debt limitation, is well established. And it is no defense to a suit by a utility which would be injured by such competition that the utility has no exclusive franchise, and that the municipality has the lawful right to compete with it. If the respondents position were sound, such a suit would fail on the ground that the municipality having the lawful right to compete, no right of the plaintiff would be infringed and the resulting damage would be *absque injuria*. Contrary to the contention of the respondents, however, the right of the utility to maintain such a suit is uni-

formly recognized. City of Campbell v. Arkansas-Missouri Power Co., 55 F. (2d) 560; Oklahoma Utilities Co. v. City of Hominy, 2 F. Supp. 849; Iowa Southern Utilities Co. v. Cassill, 69 F. (2d) 703; Gallardo v. Porto Rico Ry. L. & P. Co., 18 F. (2d) 918; Colorado Central Power Co. v. Municipal Power Development Co., 1 F. Supp. 961; Mississippi Power Co. v. City of Starkville, 4 F. Supp. 833; Frost v. Corporation Commission of Oklahoma, 278 U. S. 515, 73 L. Ed. 483.

This principle is even more clearly shown by Citizens Electric Illuminating Company v. Lackawana & Wyoming Valley Power Co., 255 Pa. 145. There a utility company was permitted to enjoin the defendant from selling electricity to another utility which was lawfully competing with plaintiff. The sale violated law, but there would be no injury except for the lawful competition. That the plaintiff had no right against the lawful competition was held to be beside the point. The issue, was, rather, whether the defendant in furnishing electricity to the competing plant was violating the law. And since it was, the court held that an injunction would issue.

The general principle that a wrongdoer cannot shield himself behind a legal right of a third party and that liability exists as against him notwithstanding the fact that there is no liability against the third party, is well established by numerous authorities.

In 18 Harv. L. Rev., at page 412, Professor Ames said:

> "The wilful causing of damage to another by a positive act, whether by one man alone, or by several acting in concert, and whether by direct action against him or *indirectly by inducing a third person to exercise a lawful right*, is a tort unless there was just cause for inflicting the damage." (Italics supplied).

Mr. Justice Holmes in 8 Harv. L. Rev., at page 11, states the principle as follows:

> "To sum the matter up in a rule, where it is sought to make a man answerable for damage, and the act of a third person is nearer in time than the defendant's to the harm, if the third person's act was lawful, it stands like the workings of nature, and the question is whether it reasonably was to be anticipated or looked out for; but if the third person's act was unlawful, the defendant must be shown to have intended the act, or at least to have expected it, and to have intended consequences which could not happen without the act."

In Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, the plaintiff's employees might have left its service at any time they pleased, and no legal right of the plaintiff would have been infringed. Yet plaintiff was permitted to maintain its suit against the defendants to enjoin them from unlawfully inducing its employees to quit its service, although it would have had no cause of action against the employees themselves if they had quit of their own accord.

In Truax v. Raich, 239 U. S. 33, the employment was at will and plaintiff's employer had a legal right to discharge him at any time and for any or no reason. Nevertheless plaintiff was granted an injunction against the enforcement of a state statute prohibiting the employment of aliens, the enforcement of which would have caused plaintiff's employer to discharge him. He would have had no cause of action against the employer for discharging him, but he did have a cause of action against the enforcement of an unconstitutional statute which would have caused his discharge.

In Hammer v. Dagenhart, 247 U. S. 251, the mill might have discharged plaintiff's minor son at any time without

violating any duty owed the plaintiff. Yet the plaintiff was entitled to an injunction against the enforcement of a federal statute which would have caused the discharge of his son.

In Pierce v. Society of Sisters, 268 U. S. 510, the patrons of plaintiff's school were free to withdraw their patronage whenever they chose to do so. Yet the plaintiff was granted an injunction against the enforcement of a statute which would require plaintiff's patrons to send their children to public schools. If in that case this court had followed the theory advanced by counsel for respondents in the instant case, it would have denied the plaintiff any relief upon the ground that the threatened injury to the plaintiff would be the result of the lawful action of its patrons in exercising their legal right to cease patronizing the school, and hence that no legal right of the plaintiff would be invaded. This court would have looked only at the last link in the chain of causation producing the plaintiff's injury, and would have refused to see that back of this link, as the active and real cause of the injury, was the unlawful action of a state officer in enforcing an unconstitutional state statute requiring plaintiff's patrons to send their children to a public school.

2. *The petitioner's business is a private property interest which the law will protect against invasion through the unlawful acts of a public official.*

In Pierce v. Society of Sisters, 268 U. S. 510, 69 L. ed. 1070, to which we have just referred, the defendants, state officials, intended to enforce the Compulsory Education Act of the State of Oregon requiring parents or other persons having the control of children between stated ages to send them "to a public school" during each school year. The plaintiffs operated private schools in competition with the public schools. The public schools

had a perfect right to compete with plaintiffs and plaintiffs had no right by contract or otherwise to have the children sent to their schools. Yet the plaintiffs did have the right to operate their schools without unlawful interference, and since the Act under which the defendants claim the right to act was unconstitutional, and since the "inevitable practical result" of the threatened act of the defendants would be the destruction of plaintiffs' schools, an injunction was granted for the protection of the plaintiffs' rights. The Court said:

> "Generally it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any proper power. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons, and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in Truax v. Raich, Truax v. Corrigan, and Terrace v. Thompson, supra, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 62 L. ed. 260, L. R. A. 1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 461; Duplex Printing Press Co. v. Deering, 254 U. S. 443, 65 L. ed. 349, 16 A.L.R. 196, 41 Sup. Ct. Rep. 172; American Steel Foundries v. Tri-City Cent. Trades Council, 257 U. S. 184, 66 L. ed. 189, 27 A.L.R. 360, 42 Sup. Ct. Rep. 72; Nebraska Dist. v. McKelvie, 262 U. S. 404, 67 L. ed. 1047, 43 Sup. Ct. Rep. 628; Truax v. Corrigan, 257 U. S. 312, 66 L. ed. 254, 27 A.L.R. 375, 42 Sup. Ct. Rep. 124, and cases there cited."

Respondents contend that a suit for injunction does not lie against a public official unless he would be liable to suit if he threatened to do as an individual what he proposes to do as a public official. This contention of respondents entirely leaves out of account the fact that in such suits it is the officer's abuse of authority which is the wrong complained of and the real cause of complainants injury.

It is, we think, unnecessary to point out the absurdities to which this contention would lead if carried to its logical conclusion or to consider whether the doctrine even as urged by respondents is applicable to the facts of this case. The doctrine was expressly rejected by this court in Ex parte Young, 209 U. S. 123, and is in direct conflict with a long line of decisions, some of which are cited in Pierce v. Society of Sisters, *supra*, upholding the right of an individual, who will be specially grieved by the unlawful acts of a public official, to enjoin such action.

In Philadelphia Co. v. Stimson, 223 U. S. 605, the established doctrine was stated by the court as follows:

> "Where the officer is proceeding under an unconstitutional act, its invalidity suffices to show that he is without authority, and it is this absence of lawful power and his abuse of authority in imposing or enforcing in the name of the State unwarrantable exactions or restrictions, to the irreparable loss of the complainant, which is the basis of the decree. Ex parte Young, 209 U. S. p. 159. And a similar injury may be inflicted, and there may exist ground for equitable relief, when an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government against the individual owner, is guilty of invasion of private property."

3. *A public official may be enjoined from illegal acts involving the unauthorized expenditure of public funds at the suit of an individual who will be specially grieved thereby.*

In *Frothingham v. Mellon*, 262 U. S. 447, 486, 67 L. Ed. 1078, 1084, the plaintiff brought suit to enjoin the enforcement of a Federal Appropriation Act. She sued only in her capacity as a taxpayer of the United States, and the sole ground of her suit was that the Act was invalid and would increase the burden of her taxes.

The court denied the right of a federal taxpayer to maintain such a suit upon three grounds:

First. "*His interest* in the monies of the Treasury—partly realized from taxation and partly from other sources—*is shared with millions of others;* is comparatively *minute and indeterminable;* and the effect upon future taxation of any payment out of the funds so *remote, fluctuating* and *uncertain* that no basis is afforded for an appeal to the preventive powers of a court of equity." (Italics supplied).

Second. That to permit such a suit to be maintained by any taxpayer would subject public officials to the inconvenience of a multiplicity of actions and thereby unduly embarrass them in the administration of their public duties, because, "If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, * * * in respect of every other Appropriation Act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained."

Third. That the court has no power to review Acts of Congress except at the suit of a party "able to show not only that the statute is invalid, but that he *has sustained or is immediately in danger of sustaining some direct injury as*

the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." (Italics supplied).

It will thus be noted that the very authority which established in this court the general rule that a taxpayer who will sustain no injury other than that suffered in common with other taxpayers cannot sue to enjoin the enforcement of a statute whose administration requires the outlay of public monies, is equally clear in its recognition of the exception which permits such a suit by a party who has sustained or is immediately in danger of sustaining some direct injury as the result of the enforcement of such a statute.

In Warner-Quinlan Asphalt Co. v. Carlisle, 158 App. Div., N. Y. Sup. Ct. 638, the plaintiff sued to enjoin the letting of a certain contract for highway repairs, on the ground that the proposal for bids contained specifications which were in violation of the state highway law. It alleged that it was a producer of liquid asphalt which answered all the tests prescribed in the proposals except the forbidden specifications, and that the inclusion of these wrongfully precluded it from furnishing asphalt for state highway work. The court held that the case presented not simply the question of prohibiting the plaintiff from becoming a bidder upon state work, but that the denial to the plaintiff of an opportunity to bid was an injury to its business which was a property right, and that the plaintiff had a standing in court to enjoin the illegal infringement of this right. The court reviewed the New York authorities, holding "that an officer of the state cannot be enjoined at the suit of an individual taxpayer *who has no special rights or grievances aside from the great mass of taxpayers.*" But held that the plaintiff's suit came within the exception to the general rule and could be maintained "because of the threatened injury to his individual rights."

In restraining illegal action by a public official at the suit of a party specially grieved by such action, a court of equity is exercising a well established equitable jurisdiction. It is under this head of equitable jurisdiction that equity restrains officials of the government from acts constituting an invasion of individual rights where such acts are not authorized by statute, or where the statute authorizing them is void because in conflict with some provision of the Constitution. *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620, 32 S. Ct. 340, 56 L. Ed. 570; *Lane v. Watts*, 234 U. S. 525, 540, 34 S. Ct. 965, 58 L. Ed. 1440; *Colorado v. Toll*, 268 U. S. 228, 230, 45 S. Ct. 505, 69 L. Ed. 927; *Pierce v. Society of Sisters*, 268 U. S. 510, 69 L. Ed. 1070; *Ferris v. Wilbur*, (C. C. A. 4th) 27 F. (2d) 262; *Pomeroy's equity*, Sec. 1345; *Pomeroy's Equitable Remedies*, Secs. 321, 326; *Hill v. Darger*, 8 F. Supp. 189; 32 C. J. 240, 247, 261, 264.

On the same principle equity will enjoin a common or public nuisance at the suit of a private person who will suffer a special grievance therefrom. *The Mayor of Georgetown v. The Alexandria Canal Co.*, 12 Peters 91, 98-100, 9 L. Ed. 1012, 1015-6; *Corning v. Lowerre*, 6 Johns. Chan. 439.

Even the enforcement of a criminal statute will be enjoined on the ground of its unconstitutionality at the suit of a private individual who will be specially injured in his property rights by the enforcement of the statute.

In *Truax v. Raich*, 239 U. S. 33, 37, 60 L. Ed. 131, 133, the court said:

> "It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors' (Re Sawyer, 124 U. S. 200, 210, 31 L. Ed. 402, 405, 8 Sup. Ct. Rep. 482), a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, *when*

the prevention of such prosecutions is essential to the safeguarding of rights of property. Davis & F. Mfg. Co. v. Los Angeles, 189 U. S. 207, 218, 47 L. Ed. 778, 780, 23 Sup. Ct. Rep. 498; Dobbins v. Los Angeles, 195 U. S. 223, 241, 49 L. Ed. 169, 177, 25 Sup. Ct. Rep. 18; Ex parte Young, supra; Philadelphia Co. v. Stimson, 223 U. S. 621, 56 L. Ed. 577, 32 Sup. Ct. Rep. 340. *The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law.* (Italics supplied).

The objection to suits by taxpayers generally to restrain the enforcement of appropriation statutes on the score that to permit such suits would lead to a multiplicity of actions, with the attendant inconveniences resulting therefrom, has no application to a suit by a party specially grieved. The interest that will justify such a suit is of a sort that will give rise to no such danger or inconvenience. This is illustrated by the fact that the validity of even a criminal statute may be challenged by a party who will sustain a direct injury to his property rights by the enforcement of the statute.

In the instant case the action of the Administrator in authorizing the project and in allotting funds for its construction will inflict special injury upon petitioner and his action being unauthorized and illegal, for the reasons hereinbefore argued, the petitioner's right to relief comes squarely within the doctrine of the foregoing authorities.

4. *Cases relied on by respondents.*

Railroad Co. v. Ellerman, 105 U. S. 166, is relied upon by respondents. The plaintiff in that case was the operator of certain public wharves. He sought to restrain a lease by the defendant railroad of certain wharves owned by it, which were to be operated in competition with the plaintiff. The plaintiff's right to relief, if any, this court concluded, rested

upon plaintiff's assertion that the lease was beyond the corporate powers of the defendant, Railroad Company; and this issue the court said the plaintiff could not raise as only the state or a stockholder could raise the question of ultra vires under the circumstances. The case is an application of the familiar principle that only the state, a stockholder, or in some instances a creditor, may question the violation of powers contained in a corporate charter. It has no applicability here.

In Edward Hines Trustees v. United States, 263 U. S. 143, and Sprunt & Sons v. United States, 281 U. S. 249, the plaintiffs complained of the removal of rates which created a discrimination in plaintiff's favor. It was contended the change was caused by an order of the Commission, but this court concluded that in neither case had the plaintiff shown its injury was proximately produced by the Commission's order. In the Hines case the court said:

> "It is not alleged that the carriers wish to impose such charges (those removed by the order) and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered." (p. 148).

In the Sprunt case this Court similarly said:

> "The carriers who were respondents before the Commission filed the new rates presumably because they now desire them. Nothing to the contrary is shown. So far as the carriers are concerned, it is as if the new rates had been filed wholly of their own accord and as if there had never been a controversy before the Commission." (p. 256).
>
> "A judgment in appellants' favor would be futile. It would not restore the appellants to the advantage previously enjoyed. If the Commission's order is set aside, the carriers would still be free to continue to equalize the rates; and for aught that appears would continue to do so." (p. 258).

No such situation is here presented. The evidence establishes, and the District Court found on both trials, that petitioner's injury will be brought about by the Administrator's action. It is his use of federal funds that would make possible petitioner's injury, and this injury is the necessary and intended result of that use of such funds. Furthermore petitioner is not complaining of the removal of a discrimination practiced against others, as were the plaintiffs in the Hines and Sprunt cases—petitioner is complaining of the destruction of its business and property by the unlawful action of a public official.

In the Chicago Junction Case, 264 U. S. 258, the New York Central Railroad Company secured the approval of the Interstate Commerce Commission for the purchase by the New York Central of the terminal roads entering Chicago. This purchase would have resulted in extensive damage to plaintiff's business, and could not have been made except with the Commission's approval. This approval by the Commission this court concluded was the proximate cause of the damage to plaintiff's business, and plaintiff was consequently held entitled to put in question its legality. The court said:

> "If, as suggested in Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry Co., 218 U. S. 88, 109, a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here." (p. 266).

The case directly supports petitioner's contentions here. In the absence of the Transportation Act the New York Central could have acquired the desired roads without any approval by the Commission. But that Act injected into the picture the Interstate Commerce Commission as the controlling factor as to whether the purchase could be made, and thus the legality of the official action of the Commission became material. Similarly Greenwood County is free at any time to lawfully compete with petitioner, but here the

proximate cause of the injury which petitioner will sustain is the subsidy of federal funds to be advanced by the Administrator, and therefore the legality of his action becomes material.

The respondents add nothing to their argument by the contention that petitioner's right to operate is subject to "a congenital defect" within the meaning of that term as used in Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, and in Madera Water Works Co. v. Madera, 228 U. S. 454. The phrase is catchy, but it does not alter the principle that although the holder of a non-exclusive franchise cannot complain of legal competition, yet he is entitled to be protected against unlawful action which proximately results in his damage. In the Puget Sound case the plaintiffs sought to enjoin the enforcement of a city ordinance which subjected it to a license or excise tax based on gross income, on the ground that the ordinance denied to it equal protection of the laws, in that the city was operating a municipal plant whose income was not subject to the tax. The Court held that since the city had the right to compete with the plaintiff the competition created no illegality in the ordinance of which the plaintiff could complain in its suit against the city. In the Madera case the plaintiff contended that its franchise should be construed as an exclusive franchise, and that therefore the threatened competition by the city would be illegal. The Court construed the franchise as conferring no exclusive right on the plaintiff, and hence the plaintiff's suit against the City necessarily failed. The cases plainly have no application to the question here presented. In them the fact of municipal ownership was relied on to create the illegality complained of. Here the illegality complained of is the illegal use of federal funds and a decree in favor of the petitioner would not affect the right of municipal operation.

X.

The District Court should have limited the retrial of the cause to the question of whether or not there had been any material change in the cause supervening since the entry of the original decree of injunction, as alleged in the respondents' motion for remand, and, upon the failure of respondents to establish the allegation of their motion, the District Court erred in granting respondents a rehearing of the original cause and in permitting them to introduce evidence in contradiction of the evidence taken on the original hearing and should have considered and determined the questions involved in the case and rendered its decree herein on the record as made on the original hearing.

This court remanded the cause for retrial solely on the *allegation* of the motion of the Administrator that Judge Watkins had held that certain provisions of the contract of December 8, 1934, were in excess of Greenwood County's authority under the laws of South Carolina and that these provisions had been eliminated by substitution of the new contract of November 30, 1935. Upon the cause being remanded respondents failed to establish this allegation of their motion. Hence the entire basis for a retrial failed. Under these circumstances to permit the defendants thus to gain the benefit of a rehearing of the original cause and thereby to obtain an opportunity to introduce evidence in contradiction of the evidence taken on the original hearing was manifestly in conflict with firmly established rules of procedure. Southard v. Russell, 16 How. 547, 14 L. Ed. 1052; Gray v. Murray, 4 Johns. Ch. 412; Buffington v. Harvey, 95 U. S. 99, 24 L. Ed. 381; Beard v. Burts, 95 U. S. 434, 24 L. Ed. 485; Society of Shakers v. Watson, 23 C.C.A. 263, 77 Fed. 512, 515; Lavagnino v. Prall, 281 Fed. 581, 583; Street, Fed. Equity Practice, Vol. II, p. 1274; Putnam v. Day, 22 Wall. 60, 64.

This court in remanding the case did not set aside any of the proceedings theretofore had in the District Court. It did not reverse the decree of that court for any error committed by the court. It merely vacated the decree of that court in order that it might be free to investigate the allegation of the motion that there had been a material change in the case since the entry of its final decree. Therefore, the proceedings had in the District Court up to the point of entry of the final decree were unaffected and remained as a part of the record of the cause.

In The Board of Supervisors of Wayne County v. Kennicott, 94 U. S. (4 Otto) 498, 24 L. Ed. 260, this Court in reversing a decree of the Circuit Court upon a former appeal ordered that the cause be remanded "with directions to award a new trial." However, when the case came back on a second appeal the court said:

> "Technically, *there can be no 'new trial' in a suit in equity; and as our mandates are to be interpreted according to the subject matter of the proceeding here,* and if possible, so as not to cause injustice (Story v. Livingston, 13 Pet., 359), it is proper to inquire what must have been intended by the use of that term in the decree, *since it cannot have its ordinary meaning.* * * * Under these circumstances, it is apparent that *the words 'new trial' were used to convey the idea of such further action as should be found necessary to carry into effect what had been already decided.* No error has been assigned upon the proceedings in the Circuit Court under the mandate construed in this way, and the decree of the Circuit Court is, therefore, affirmed."

The majority opinion of the Court of Appeals calls attention to the fact that the decree of the District Court was set aside pursuant to the mandate of this court and states that the setting aside of the decree left the cause in pre-

cisely the same position that it would have occupied if no final decree had ever been entered and that "there can be no doubt as to the power of the court in an equity cause, until final decree has been entered, to hear additional evidence and modify or set aside any finding of fact theretofore made." (R. 851). The Court of Appeals, however, lost sight of the fact that the decree of the District Court was set aside pursuant to the mandate of this court solely in order that the District Court might be free to investigate the question of whether there had been any material change in the case supervening since the decree of Judge Watkins as alleged in respondents' motion for a remand. But for the allegation of the motion the respondents would have had no right to a rehearing as the term at which the decree was rendered had long since expired. We repeat that the respondents, merely by the allegation of their motion, which they failed to support, could not gain the benefit of a rehearing to which otherwise they would not have been entitled.

We have hereinbefore argued the case on the record as supplemented on the retrial, contending that the evidence taken on the retrial strengthens and confirms the case made by petitioner on the original hearing. Yet the correctness of the action of the trial court in granting respondents a rehearing of the original cause and in permitting them to introduce evidence in contradiction of the evidence taken on the original hearing does arise on the record (R. 555-7, 641, 802-3); and, we submit, for the reasons stated above, that this action of the trial court was erroneous.

CONCLUSION

For the foregoing reasons it is submitted that the decree of the Circuit Court of Appeals should be reversed, and the cause remanded to the District Court with directions to enter a decree for the petitioner permanently enjoining the respondents from using any funds of the United States to construct the electric power plant described in the bill of complaint.

Respectfully submitted,

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November 15, 1937.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY,

Petitioners,

vs.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS,

Respondents.

APPENDIX TO BRIEF FOR PETITIONERS

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APPENDIX

PERTINENT SECTIONS OF THE NATIONAL INDUSTRIAL RECOVERY ACT.

AN ACT

To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes. (48 Stat. 195).

Be It Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

TITLE I—INDUSTRIAL RECOVERY

DECLARATION OF POLICY

SECTION 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of coöperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources. (48 Stat. 195; 15 U. S. C. 701).

* * * *

TITLE II—PUBLIC WORKS AND CONSTRUCTION PROJECTS

FEDERAL EMERGENCY ADMINISTRATION OF PUBLIC WORKS

SECTION 201. (a) To effectuate the purposes of this title, the President is hereby authorized to create a Federal Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereafter referred to as the "Administrator"), and to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed. The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint.

(b) The Administrator may, without regard to the civil service laws or the Classification Act of 1923, as amended, appoint and fix the compensation of such experts and such other officers and employees as are necessary to carry out the provisions of this title; and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books and books of reference, and for paper, printing and binding) as are necessary to carry out the provisions of this title.

(c) All such compensation, expenses, and allowances shall be paid out of funds made available by this Act.

(d) After the expiration of two years after the date of the enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section I has ended, the President shall not make any further loans or grants or enter

upon any new construction under this title, and any agencies established hereunder shall cease to exist and any of their remaining functions shall be transferred to such departments of the Government as the President shall designate; Provided, that he may issue funds to a borrower under this title prior to January 23, 1939, under the terms of any agreement, or any commitment to bid upon or purchase bonds, entered into with such borrower prior to the date of termination, under this section, of the power of the President to make loans. (48 Stat. 200, 40 U. S. C. 401).

SECTION 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and parkways, public buildings, and any publicly-owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control and also the construction of any river or drainage improvement required to perform or satisfy any obligation incurred by the United States through a treaty with a foreign Government heretofore ratified and to restore or develop for the use of any State or its citizens water taken from or denied to them by performance on the part of the United States of treaty obligations heretofore assumed: Provided, That no river or harbor improvement shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and

Construction Act of 1932, as amended, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; and if in the opinion of the President it seems desirable, the construction of naval vessels within the terms and/or limits established by the London Naval Treaty of 1930 and of aircraft required therefor and construction of heavier-than-air aircraft and technical construction for the Army Air Corps and such Army housing projects as the President may approve, and provision of original equipment for the mechanization or motorization of such Army tactical units as he may designate: Provided, however, That in the event of an international agreement for the further limitation of armament, to which the United States is signatory, the President is hereby authorized and empowered to suspend, in whole or in part any such naval or military construction or mechanization and motorization of Army units: Provided, further, That this title shall not be applicable to public works under the jurisdiction or control of the Architect of the Capitol or of any commission or committee for which such Architect is the contracting and/or executive officer. (48 Stat. 201; 40 U. S. C. 402).

SECTION 203. (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection

with the construction of any such project, and to sell any security acquired or any property so constructed or acquired or to lease any such property with or without the privilege of purchase: Provided, That all moneys received from any such sale or lease or the repayment of any loan shall be used to retire obligations issued pursuant to section 209 of this Act, in addition to any other moneys required to be used for such purpose; (4) to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities; and (5) to advance, upon request of the Commission having jurisdiction of the project, the unappropriated balance of the sum authorized for carrying out the provisions of the Act entitled "An Act to provide for the construction and equipment of an annex to the Library of Congress," approved June 13, 1930 (46 Stat. 583); such advance to be expended under the direction of such Commission and in accordance with such Act: Provided, that in deciding to extend any aid or grant hereunder to any State, county, or municipality, the President may consider whether action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof. The provisions of this section and section 202 shall extend to public works in the several States, Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

(b) All expenditures for authorized travel by officers and employees, including subsistence, required on account of any Federal public-works projects, shall be charged to the amounts allocated to such projects, notwithstanding any other provisions of law; and there is authorized to be employed such personal services in the District of Columbia and elsewhere as may be required to be engaged upon such work and to be in addition to employees otherwise provided for, the compensation of such additional personal services to be a charge against the funds made available for such construction work.

(c) In the acquisition of any land or site for the purposes of Federal public buildings and in the construction of such

buildings provided for in this title, the provisions contained in sections 305 and 306 of the Emergency Relief and Construction Act of 1932, as amended, shall apply.

(d) The President, in his discretion, and under such terms as he may prescribe, may extend any of the benefits of this title to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness. (48 Stat. 202; 40 U. S. C. 403).

* * * *

SECTION 206. All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure (1) that no convict labor shall be employed on any such project; (2) that (except in executive, administrative, or supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week; (3) that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort; (4) that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (A) to citizens of the United States and aliens who have declared their intentions of becoming citizens, who are bona fide residents of the political subdivision and/or county in which the work is to be performed, and (B) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed: Provided, That these preferences shall apply only where such labor is available and qualified to perform the work to which the employment relates; and (5) that the maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage. (48 Stat. 204, 40 U. S. C. 406).

* * * *

ISSUE OF SECURITIES AND SINKING FUND

SECTION 210. (a) The Secretary of the Treasurer is authorized to borrow, from time to time, under the Second Liberty Bond Act, as amended, such amounts as may be necessary to meet the expenditures authorized by this Act, or to refund any obligations previously issued under this section, and to issue therefor bonds, notes, certificates of indebtedness, or Treasury bills of the United States. (48 Stat. 206; 40 U. S. C. 410 (a)).

* * * *

APPROPRIATION

SECTION 220. For the purposes of this Act, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $3,300,000,000. (48 Stat. 210; 40 U. S. C. 411).

Act No. 299 of the 1933 Acts of the General Assembly of the State of South Carolina.

AN ACT to Authorize Any County, Township, City or Incorporated Town of the State of South Carolina to Purchase or Construct a Waterworks System, Water Supply System, Sewer System, Sanitary Disposal Equipment and Appliances, Light Plant or System, Natural Gas System, Ice Plants, Power Plants and/or Distribution Systems, Gas Plants, Incinerator Plants, Hospitals, Piers, Docks, Terminals, Air Ports, Toll Bridges, Ferries, Drainage Systems, Public Markets, Public Recreation Parks, Swimming Pools, Golf Courses and Stadiums, and in Furtherance Thereof to Purchase or Construct Any Necessary Part of Any Such System Either Within or Without the Limits of Such County, Township, City, or Incorporated Town, as the Case May Be: and to Authorize Any County, Township, City or Incorporated Town of the State of South Carolina Now or Hereafter Owning and Operating Any Such System or Plant to Improve, Enlarge, Extend or Repair the Same: and for Any Such

Purpose or Purposes to Authorize Any Such County, Township, City or Incorporated Town to Issue Revenue Bonds Payable Solely from the Revenues Derived from the Operation of Any Such System, Project or Systems: to Regulate the Issuance, Sale, Retirement, and Refunding of Such Bonds and of Other Matters in Connection Therewith: to Regulate the Use of the Revenues of Such System or Systems When Such Bonds are Issued or Outstanding: to Provide for the Operation of Any Such System or Systems in Case of Deficiencies in Such Revenues, and for Other Purposes.

SECTION 1. Sub-Divisions of the State May Purchase, Construct, and/or Improve Waterworks Systems, Water Supply Systems, Sewer Systems, Sanitary Disposal Equipment, Light Plants, Natural Gas Systems, Ice Plants, Power Plants, Gas Plants, Incinerator Plants, Hospitals, Piers, Docks, Terminals, Air Ports, Toll Bridges, Ferries, Drainage Systems, Public Markets, Public Recreation Parks, Swimming Pools, Golf Courses and Stadiums—"System" Defined.

Be it enacted by the General Assembly of the State of South Carolina: That any county, township, city or incorporated town of the State of South Carolina is authorized to purchase or construct a waterworks system, water supply system, sewer system, sanitary disposal equipment and appliances, light plant or system, natural gas system, ice plants, power plants and/or distribution systems, gas plants, incinerator plants, hospitals, piers, docks, terminals, air ports, toll bridges, ferries, drainage systems, public markets, public recreation parks, swimming pools, golf courses and stadiums, and in furtherance thereof to purchase or construct any necessary part of any such system either within or without the limits of *such county*, or the corporate limits of such city or incorporated town, and any county, township, city or incorporated town of the State of South Carolina which may now or hereafter own and operate any such system is authorized to improve, enlarge, extend or repair the same. The work system as used in this Act shall include all of the projects and undertakings referred to in this section.

SECTION 2. Cumulative—Alternate Method.—This Act shall be construed as cumulative authority for the purposes named in Section 1 hereof, and as to the manner and form of issuing revenue bonds for any such purpose or purposes, and shall not be construed to repeal any existing laws with respect thereto, it being the purpose and intention of this Act to create an additional and alternate method for the purposes herein named.

SECTION 3. "Borrower" Defined.—The word "borrower" as used in this Act shall be construed to mean the county, township, city or incorporated town as the case may be, operating under this Act.

SECTION 4. "Borrowing Body" Defined.—The term "governing body" as used in this Act shall be construed to mean, in the case of a county, the Board of County Commissioners, or other like governing body thereof, in the case of a city or incorporated town, the Board of Commissioners, the Mayor and Council, or other like governing body thereof, and in the case of a township the Board of County Commissioners, or the governing body of the County in which the township is located.

SECTION 5. Make Estimate of System.—Whenever the governing body of any borrower shall determine to purchase, construct, improve, enlarge, extend, or repair any system named in Section 1 under the provisions of this Act, it shall first cause an estimate to be made of the cost thereof, and the fact that such estimate has been made and the amount thereof shall appear in the ordinance authorizing and providing for the issuance of the bonds.

SECTION 6. Powers of Borrower.—Ordinances — Resolutions.—For the purposes of this Act any borrower is authorized to adopt ordinances providing for the issuance of revenue bonds as herein stated, and any and all other appropriate ordinances and resolutions deemed necessary to effectuate the full intent and purpose of this Act, including the segregation of revenues derived from the operation of any project named in Section 1 hereof, the determination, fixation and revision from time to time of rates to be charged for services, and

any and all other necessary ordinances and resolutions to protect the properties, to provide for the adequate operation thereof, and to insure the security of the bonds. Provided, However, That in the case of counties and townships the style of any ordinance or resolution adopted under this Act shall be the same as is provided by the laws of the State in the case of cities, and the manner of adoption thereof shall be as is provided in the general laws of the State for cities. The amendment of such ordinances and resolutions of counties shall be as is provided by the general laws of the State for amendment of ordinances of cities. Such ordinances and resolutions of counties shall be recorded in the minutes of the governing body thereof as soon as practicable after their passage and shall be authenticated by the signature of the clerk of such governing body. Any such ordinances or resolutions of counties may be published in a newspaper of general circulation in such county.

SECTION 7. May Borrow—Issue Bonds—Bonds—Payment. For the purpose of defraying the cost of purchasing, constructing, improving, enlarging, extending or repairing any such system or project, any borrower may borrow money and issue its negotiable serial bonds, provided that no such bonds shall be issued unless and until authorized by an ordinance which shall set forth a brief description of the contemplated improvement, the estimated cost thereof, the amount, maximum rate of interest, time and place of payment and other details in connection with the issuance of the bonds. Such serial bonds shall bear interest at not more than six per cent (6%) per annum, payable semi-annually, and shall be payable at such times, not exceeding forty-five (45) years from their date, and at such places as shall be prescribed in the ordinance providing for their issuance. The bonds and the coupons shall be executed in such manner and shall be substantially in the form provided in the authorizing ordinance. Such bonds shall be sold in such manner and upon such terms as the governing body shall deem for the best interests of the borrower. In no event shall any of the bonds be sold on a basis to yield more than six per cent (6%) per annum from the date

of sale to the date of average maturity of the bonds sold. Provided, however, That in any contract for the purchase or construction of any system or project named in Section 1, or for the improvement, enlargement, extension or repair of any such system or project provision may be made that payment therefor shall be made in such bonds. Such bonds and their coupons may be made payable in lawful money of the United States of America, or in gold coin of the standard weight and fineness existing on the date thereof. Such bonds shall mature annually, or semi-annually and the first installment thereof shall be made payable not more than five (5) years from the date of such bonds. No such installment shall be more than two and one-half times as great in amount as the smallest prior installment of the same issue. If all the bonds of an issue are not issued at the same time, the bonds at any one time outstanding shall mature as aforesaid. The principal of and interest upon such bonds shall be payable solely from the revenue derived from the operation of the system or project for the purchase, construction, improvement, enlargement, extension, or repair of which the same are issued; Provided, however, That where a borrower improves, enlarges, extends, or repairs any system or project named in Section 1 the principal of and interest upon such bonds may be made payable from the revenues derived from the operation of the entire system or project. No bond or coupon issued pursuant to this Act shall constitute an indebtedness of such borrower within the meaning of any State constitutional provision or statutory limitation. It shall be plainly stated on the face of each such bond and coupon that the same has been issued under the provisions of this Act and that it does not constitute an indebtedness of such borrower within any State constitutional provision or statutory limitation. Provided, however, That any municipality now or hereafter owning and operating a system or project named in Section 1, whether constructed under the provisions of this Act or not, and desiring to improve, enlarge, extend or repair the same, may issue revenue bonds under the provisions of this Act to pay for such improvements, enlargements, extensions or repairs, payable from the net revenues to be derived from the operation of the existing system or project

as improved, enlarged, extended or repaired, but nothing in this proviso shall be construed as authorizing any such municipality to impair or commit a breach of the obligation of any valid lien or contract created or entered into by it, the intention hereof being to authorize the pledging, setting aside and segregation of such revenues for the construction of such improvements, enlargements, extensions or repairs only where consistent with outstanding obligations of such municipality.

SECTION 8. Bond Holders Have Lien on System.—There shall be created in the authorizing ordinance a statutory lien upon any such system or project, and the appurtenances and extensions thereto so to be purchased, constructed, improved, enlarged, extended or repaired, to and in favor of the holders of said bonds and each of them and to and in favor of the holders of the coupons of said bonds, and each of them. Provided, however, That where any borrower purchases, constructs, improves, enlarges, extends or repairs any system or project named in Section 1, said statutory lien may be created and declared to be upon the whole of such combined system or project with appurtenances and extensions thereto, if the governing body so determines.

SECTION 9. Enforcement of Lien of Bond Holders.—Such system project or combined system so purchased, constructed, improved, enlarged, extended or repaired shall remain subject to said statutory lien until payment in full of the principal of and interest upon said bonds. Any holder of any said bonds or of any of the coupons representing interest accrued thereon, may, either at law or in equity, by suit, action, mandamus, or other proceedings, protect and enforce said statutory lien and may, by suit, action, mandamus, or other proceedings, enforce and compel performance of all duties of the officials of the borrower, including the fixing of sufficient rates, the collection of revenues, the proper segregation of the revenues of the project or combined system, and the proper application thereof. Provided, however, That said statutory lien shall not be construed to give any such bond or coupon

holder authority to compel the sale of such project or combined system or any part thereof.

SECTION 10. Receiver—Appointment—Duties and Powers. If there be any default in the payment of the principal of or interest upon any of said bonds, any court having jurisdiction in any proper action may appoint a receiver to administer and operate the system, project or combined system so encumbered on behalf of the borrower with power to fix and charge rates and collect revenues sufficient to provide for the payment of any bonds or other obligations outstanding against said systems or combined system and for the payment of the expenses of operating and maintaining the same and to apply the income and revenues of said system, project or combined system in conformity with this act and the ordinance providing for the issuance of such bonds.

SECTION 11. Limitations of Bonds.— The bonds authorized hereunder shall not be subject to any limitations or provisions of the municipal bond code or the bond laws for counties as now in force or hereafter amended.

SECTION 12. Bonds Legal Inyestments.—Bonds issued under the provisions of this Act are legal investments for executors, administrators, trustees and other fiduciaries and for savings banks and insurance companies organized under the laws of this State.

SECTION 13. Bonds Tax Exempted.—The bonds and interest coupons issued hereunder are hereby exempted from any and all State, County, municipal and other taxation whatsoever under the laws of the State of South Carolina, and it shall be plainly stated on the face of each such bond as follows: "The principal of and interest on this bond are exempted from any and all State, county and municipal and other taxation whatsoever under the laws of the State of South Carolina."

SECTION 14. Bonds Negotiable.—Such bonds shall have all the qualities of negotiable instruments under the law merchant and the negotiable instruments law.

SECTION 15. Deposit Proceeds from Bonds.—The governing body, where practicable, shall require that the proceeds of the sale of bonds issued under the provisions of this Act be deposited in a special account or accounts in a bank or banks which are members of the Federal Reserve System, and shall require, insofar as practicable, that each such deposit be secured by United States Government securities having an aggregate market value at least equal to the sum at the time on deposit, or in any event, the proceeds shall be deposited in some bank or other depository, either within or without the State, which will secure such deposit satisfactorily to said governing body.

SECTION 16. Use of Proceeds from Bonds.—All moneys received from any such bonds shall be used solely for the purchase, construction, improvement, enlargement, extension or repair of the system, project or combines system for which issued, including any engineering, legal and other expenses incident thereto; Provided, however, That such moneys may be used also to advance the payment of the interest on such bonds during the first three (3) years following the date of such bonds. Provided, That any unexpended balance of the proceeds of the sale of any such bonds remaining after the completion of the project for which issued shall be paid immediately into the Bond and Interest Redemption Fund for such bonds, and the same shall be used only for the payment of the principal of the bonds, or, in the alternative, to acquire outstanding bonds of the general issue from which the proceeds were derived, by purchase of such bonds at a price (exclusive of accrued interest) not exceeding the face amount thereof. Any bonds so acquired by purchase shall be cancelled and shall not be reissued.

SECTION 17. Undelivered Bonds Executed by Ex-officers Valid.—In case any of the officers whose signatures or counter-signatures appear on the bonds or coupons shall cease to be such officers before delivery of such bonds, such signatures or counter-signatures shall nevertheless be valid and sufficient for all purposes the same as if they had remained in office until such delivery.

SECTION 18. Payment for Service by Borrower.—No free service shall be furnished by any such system or combined system to the county, township, city or incorporated town or to any agency, instrumentality, person, firm or corporation. The reasonable cost and value of any service rendered to any such borrower by any such system, project or combined system shall be charged against the borrower and shall be paid for monthly as the service accrues from the current funds, or from the proceeds of taxes which such borrower, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, and such funds, when so paid, shall be accounted for in the same manner as other revenues of such system or combined system.

SECTION 19. Additional Bonds.—Any borrower purchasing, constructing, improving, enlarging or repairing any such system, project or combined system pursuant to the provisions of this Act, may, at the time of the authorization of such bonds for any such purpose or purposes, provide in the authorizing ordinance for additional bonds for other extensions and permanent improvements, which additional bonds may be issued and be negotiated from time to time as such proceeds for such purpose may be necessary. Such bonds, when so negotiated, shall have equal standing with the bonds of the same issue.

SECTION 20. Revenue Refunding Bonds.—Where a borrower has outstanding any bonds issued under the provisions of this Act, it may thereafter issue and negotiate new bonds on such terms as the governing body shall deem advisable for the purpose of providing for the payment of any such outstanding bonds. Such new bonds shall be designated "revenue refunding bonds," and shall be secured to the same extent and shall have the same source of payment as the bonds which have been thereby refunded.

SECTION 21. Rates for Service.—Rates for services furnished by any such system or combined system shall be fixed precedent to the issuance of the bonds. Such rates shall be sufficient to provide for the payment of the interest upon and

the principal of all such bonds as and when the same become due and payable, to create a Bond and Interest Redemption Fund therefor, to provide for the payment of the expenses of administration and operation and such expenses for maintenance of the system or combined system necessary to preserve the same in good repair and working order, to build up a reserve for depreciation of the existing system, project or combined system, and to build up a reserve for improvements, betterments and extensions to the existing system, project or combined system other than those necessary to maintain the same in good repair and working order as hereinbefore in this Section provided. Such rates shall be fixed and revised from time to time so as to produce these amounts, and the governing body shall covenant and agree in the ordinance authorizing the issuance of such bonds, and on the face of each bond at all times to maintain such rates for services furnished by such system, project or combined system as shall be sufficient to provide for the foregoing.

SECTION 22. Bond and Interest Redemption Fund.—Operation and Maintenance Fund—Depreciation Fund—Contingent Fund.—In the authorizing ordinance the governing body of the borrower shall set aside monthly (or oftener if deemed advisable) and shall pledge the gross revenues of the system, project or combined system into separate and special funds as follows: Out of the gross revenues there shall be first set aside a sum sufficient to pay the principal of and the interest upon the bonds as and when the same become due and payable. In the event that the gross revenues of any calendar, operating or fiscal year, shall be insufficient to pay the principal of and interest on the bonds maturing in any such calendar, operating, or fiscal year, then an additional amount sufficient to pay the principal of and interest on such bonds outstanding and unpaid shall be set aside out of the gross revenues of the next succeeding calendar, operating, or fiscal year and applies to the payment of the principal of and interest on such outstanding and unpaid bonds. This fund shall be designated "Bond and Interest Redemption Fund." Out of the remaining gross revenues there shall be next set aside a sum sufficient to provide for the payment of all expenses of administration, oper-

ation, and such expenses for maintenance as may be necessary to preserve the system or combined system in good repair and working order. This fund shall be designated "Operation and Maintenance Fund." Out of the remaining gross revenues there shall be next set aside a sum sufficient to build up a reserve for depreciation of the existing system or combined system. This fund shall be designated "Depreciation Fund." Out of the remaining gross revenues there shall be next set aside a sum sufficient to build up a reserve for improvements, betterments and extensions to the existing system, project or combined system other than those necessary to maintain the same in good repair and working order as hereinbefore provided for. This fund shall be designated "Contingent Fund." Any surplus revenues thereafter remaining shall be disposed of by the governing body of the borrower as it may determine from time to time to be for the best interest of the borrower. Provided, However, that in the segregation and separation of said gross revenues into the several funds in this Section stated, the governing body may prescribe a reasonable excess amount to be placed in the Bond and Interest Redemption Fund from time to time during the earlier years of maturities of such bonds as thereby to produce and provide a cushion fund to meet any possible deficiencies therein in maturities of future years, and in the event that such excess amounts are thus provided, provision may be made in the ordinance for the scaling down of the amounts of such future years in the event the surplus so provided in the earlier years may then be found to have been accumulated and to be available. Bonds issued under the provisions of this Act shall be payable solely from the revenues in said Bond and Interest Redemption Fund.

SECTION 23. Payment Expenses of Operation or Maintenance.—Nothing in this Act shall be construed to prohibit the borrower from appropriating and using any part of its available income or revenues derived from any source other than from the operation of such system, project or combined system in paying any immediate expenses of operation or maintenance of any such system, project or combined system, but nothing in this Act shall be construed to require the borrower to do so.

SECTION 24. Custodian of Gross Revenues—Trust Funds.—The governing body of the borrower shall designate as custodian of the gross revenues from the operation of the system or combined system a bank or trust company duly qualified and doing business within the State of South Carolina, which shall be satisfactory to the governing body of such borrower. The Bank or trust company shall signify its acceptance of such custodianship by a written instrument directed to the governing body of the borrower. All funds from time to time derived from the operation of such system, project or combined system, or funds of the borrower supplemental to the Operation and Maintenance Fund, the Depreciation Fund and/or Contingent Fund shall be deposited by such borrower with such bank or trust company and be set apart by such bank or trust company pursuant to written instructions from such borrower into the appropriate fund or funds designated in Section 22 of this Act. Each and all of said designated funds from time to time held by such bank or trust company shall be impressed with a trust for the benefit of the person or persons entitled thereto.

SECTION 25. Year Basis.—The ordinance authorizing the issuance of such bonds shall definitely determine whether such system, project or combined system shall be operated upon a calendar, operating or fiscal year basis, and the dates of the beginning and ending of same.

SECTION 26. Surplus in Operation and Maintenance Fund—Disposition.—If any surplus shall be accumlated in the Operation and Maintenance Fund which shall be equal to the cost of operating and maintaining such system, project or combined system during the remainder of the calendar, operating or fiscal year, as provided by the authorizing ordinance, and the cost of operating and maintaining such system, project or combined system during the succeeding like calendar, operating or fiscal year, any such surplus may be transferred at any time by the governing body to the Depreciation Fund, Contingent Fund, or to the Bond and Interest Redemption Fund.

SECTION 27. Surplus in Depreciation Fund—Disposition.—If any surplus shall be accumulated in the Depreciation Fund

over and above that which the governing body shall find may be necessary therein during the then present calendar, operating or fiscal year and the next ensuing calendar, operating or fiscal year, any such excess may be transferred to the Contingent Fund or the Bond and Interest Redemption Fund.

SECTION 28. Surplus in Contingent Fund—Disposition.—If any surplus shall be accumulated in the Contingent Fund over and above that which the governing body shall find may be necessary for reasonable and proper improvements, betterments, and extensions to the existing system or combined system during the present calendar, operating or fiscal year and the next ensuing calendar, operating or fiscal year, any such excess may be transferred to the Bond and Interest Redemption Fund or may be applied, in so far as possible, in the purchase or retirement of outstanding bonds issued under the provisions of this Act, and for that purpose the governing body is authorized to purchase such bonds not due in the open market at not more than the fair market value thereof. Where such bonds are purchased for investment the income from such investment shall be carried into the Contingent Fund.

SECTION 29. Regulation of Rates—Franchise—No Effect on State Board of Health.—Rates charged for services furnished by any system or combined system purchased, constructed, improved, enlarged, extended or repaired under the provisions of this Act shall not be subject to supervision or regulation by any State bureau, board, commission or other like instrumentality or agency thereof, and it shall not be necessary for any borrower operating under the provisions of this Act to obtain any franchise or other permit from any State bureau, board, commission or other instrumentality thereof in order to construct, improve, enlarge, extend or repair any system or combined system named in this Act. Provided, however, That the functions, powers and duties of the State Board of Health shall remain unaffected by this Act.

SECTION 30. Books and Accounts—Annual Report—Inspection.—Any borrower issuing revenue bonds under the provisions of this Act shall install and maintain proper books of record and account (separate entirely from other records

and accounts of such borrower) in which full and correct entries shall be made of all dealings or transactions of or in relation to the properties, business and affairs of the system or combined system. The governing body of such borrower, not later than three months after the close of any calendar, operating or fiscal year, shall cause to be prepared a balance sheet and an income and surplus account, showing respectively, in reasonable detail the financial condition of the system or combined system at the close of such preceding calendar, operating or fiscal year and the financial operations thereof during such year. Said balance sheets and income and surplus accounts shall at all reasonable times during usual business hours be open to examination and inspection by any taxpayer, user of the services furnished by the system, or any holder of bonds issued under the provisions of this Act, or anyone acting for or on behalf of such taxpayer, user of the services of the system, or bondholder.

SECTION 31. Pay Bonds Before Maturities.—The governing body of the borrower authorizing bonds under the provisions of this Act may make provision for any of such bonds to be called for payment on any interest payment date before maturity provided the borrower shall have on hand in its Bond and Interest Redemption Fund sufficient moneys not otherwise appropriated or pledged, in excess of the interest and principal requirements within the next two succeeding calendar, operating, or fiscal years.

SECTION 32. No Effect on Existing Contracts and Liens.—Nothing in this Act shall be construed as authorizing any borrower to impair or commit a breach of the obligation of any valid lien or contract created or entered into by it, the intention hereof being to authorize the pledging, setting aside and segregation of gross revenues only where consistent with outstanding obligations of such borrower.

SECTION 33. Issue Bonds without Election or Notice.—This Act shall be construed as authorizing the issuance of such bonds provided for herein without submitting the proposition for the approval of same to the voters of the borrower. Where bonds are authorized under this Act it shall not be

necessary to make publication of any ordinance, resolution, notice or proceeding relating thereto. Provided, however, That nothing in this Act shall be construed to prohibit the governing body from making such publication as it may deem necessary in relation thereto.

SECTION 34. Construe Liberally.—This Act, being necessary for and to secure the public health, safety, convenience and welfare of the counties, townships, cities and incorporated towns of the State of South Carolina, shall be liberally construed to effect the purposes hereof.

SECTION 35. State Bond Commissioner—Duties—Time to Test Validity of Bonds.—For the protection of purchasers of any bonds authorized pursuant to the provisions of this Act, the Attorney General is hereby made Ex-officio Bond Commissioner of the State of South Carolina. It shall be the duty of such Bond Commissioner to prepare uniform forms and prescribe a method of procedure under the laws of the State in all cases where it is desired to issue said bonds in any county, township, city or incorporated town of the State of South Carolina; and it shall be the further duty of said Bond Commissioner to examine into and pass upon any of said bonds so issued, and said bonds, when declared by the certificate of said Bond Commissioner to be issued in accordance with this Act and the forms of procedure so provided, shall be incontestable in any court in the State of South Carolina unless suit thereon shall be brought in a court having jurisdiction of the same within thirty (30) days from the date of the approval of said bonds by the Bond Commissioner. No bond hereafter issued by any county, township, city or incorporated town pursuant to this Act shall be valid without the certificate of said Bond Commissioner.

SECTION 35-A. State Sinking Fund Commission Approve Bonds.—All Bonds authorized pursuant to the provisions of this Act shall be subject to the approval of the Sinking Fund Commission of the State of South Carolina and no bonds issued under the provisions of this Act shall be valid without the certificate of approval of the Sinking Fund Commission.

SECTION 36. Saving Clause.—The invalidity of any section, sentence, clause, paragraph or portion of this Act shall not affect the validity of the remainder of this Act.

Act No. 1095 of the 1934 Acts of the General Assembly of the State of South Carolina.

AN ACT to Authorize and Empower the Finance Board for Greenwood County to Contract with the Public Works Administration; to Perform such Acts and Duties as may be Necessary and Incident to Securing a Loan, or Loans, for a Hydro-Electric Project; to Define and Limit its Duties and Powers; to Empower the said Board to Borrow Pursuant to Authority Conferred by any Other Statute for the Purposes Named Herein and Especially Under the Provisions of an Act Entitled "An Act to Authorize any County, Township, City or Incorporated Town, Etc." Designated as Act No. 299 of the Acts of the General Assembly of 1933.

SECTION 1. Finance Board, Greenwood County, Borrow for Hydro-Electric Plant.—*Be it enacted by the General Assembly of the State of South Carolina:* That the Finance Board of Greenwood County is authorized and empowered to borrow from the Public Works Administration, or any other agency or corporation, organized under the Federal Government or pursuant to any Act of the Congress of the United States, the proceeds of any such loan to be used for the purpose of acquiring any necessary lands, easements and rights of way for a hydro-electric plant and for the construction thereof at a dam at or near "Buzzard Roost" on Saluda River and for the purchase of any and all necessary machinery or other equipment used in connection with the operation of any such plant, with the further right to construct and maintain power transmission lines.

SECTION 2. Powers of Board—Project Self Liquidating.—The said Finance Board of Greenwood County is authorized and empowered to do any and all acts necessary and incident to securing any such loans and to execute evidence of indebted-

ness therefor under such agreement as the said Board and the agency or the corporation from whom the loan is obtained may agree upon. They are empowered to pledge the property acquired as well as the income therefrom to the retirement of any such loan.

It is declared that this project is a self liquidating project and that any indebtedness or obligation created by the said Board shall not be a direct and primary obligation of the County of Greenwood; bonds or securities issued hereunder to be in accordance with the terms, conditions and powers granted and given in Act No. 299 of the Acts of the General Assembly, 1933, including all amendments thereto.

SECTION 3. Keep Funds Separate.—All funds borrowed pursuant to the authority conferred in this Act, as well as in pursuance of the authority conferred by any other statute, to be used for the purposes named herein, shall be kept separate and distinct from other funds of Greenwood County and not comingled or intermingled with the finances of the said County in any respect.

SECTION 4. All Acts or parts of Acts inconsistent with this Act are hereby repealed.

SECTION 5. This Act shall take effect upon its approval by the Governor.

Approved the 12th day of April, 1934.

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DEC 6
CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY,

Petitioners,

vs.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS,

Respondents.

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Respondents.

REPLY BRIEF FOR PETITIONERS

I.

The right of the petitioner to invoke a judicial examination of the constitutionality of Title II of the National Industrial Recovery Act and of the validity of the gift and loan of federal funds, as the same affect petitioner, is clear.

Respondents contend petitioner is without standing to subject the constitutionality or validity of the Administrator's action to judicial examination. They assert it is necessary that, in order to sustain its right to maintain this action, petitioner must show it would suffer a "direct injury as a result" of the Administrator's action. (Cts. Br. pp. 25-26). That petitioner would sustain such an injury is clear upon the

record (Pet. Br. pp. 8-12, 72-7) and it is submitted upon respondents own statement petitioner's right to sue is therefore established.

Respondents attempt to avoid the effect of these facts by arguing that the project may dispose of its product to customers not now served by petitioner. They point out that petitioner now serves only from 8 to 15 percent of the power requirements of Greenwood County. But while this is true, the fact is that the customers with which contracts have been made and the customers listed as prospective, are, with minor exceptions, precisely the same customers now served by petitioner. (R. 177, 691, 697, 340-1). Rates were fixed below petitioner's rates in order to attract petitioner's customers, (R. 696) and the business which the project would serve is business now served by petitioner.

It seems manifest that only the most compelling reasons could lead the Court to conclude that where it is plain that a citizen's property is being irreparably injured or destroyed by the action of a Government official, the citizen is without right or standing to invoke a judicial determination of the justification of the officer, if any, for so doing. Yet it is clear that if the respondents are right, any appropriation, no matter how injurious or unlawful, is, for all practical purposes, immune from judicial review; for practically the only person who could object to an unconstitutional disposition of money from the Federal Treasury would be the donee; and since he would have a complete remedy by refusing the gift, the use of public funds for unlawful purposes would be substantially without check. It is an open secret that many of those who seek an extension of federal power not countenanced by the Constitution look eagerly to the use of the spending power as a means for circumventing constitutional restrictions. If a rule is to be adopted which for all practical purposes prevents a citizen, whose property is inescapably to be destroyed by an exercise of that spending power, from taking the judgment

of the National Courts on whether his property is being lawfully taken or destroyed under the Constitution, not only is the threat to the institution of private property appalling, but the theory that the exercise of Federal power is to be confined within the limits prescribed by the Constitution becomes wholly illusory. If the exercise of the spending power is immune from judicial review to the extent claimed by the respondents in this case, then the spending power furnishes the means for carrying on every activity forbidden to the Federal Government and reserved to the states without fear or restraint by the courts so long as the state acquiesces.

Respondents' Theory of the Nature of a Suit against a Federal Officer.

The fundamental proposition upon which the entire argument of the respondents rests is: A citizen may not maintain a suit against the Administrator to prevent irreparable injury to his property or other rights through the unconstitutional perversion of the powers of government, unless the citizen states a cause of action against the Administrator as a private individual apart from any pretense or ability to exercise or bring to bear the powers of government to the injury of the citizen. Stated concretely, the contention is: It is necessary that petitioners state a cause of action against the Administrator as a private individual, and since the Administrator *might* lawfully give or loan his own money to Greenwood County for the construction of an intrastate electric utility to compete with the petitioners, the petitioners state no cause of action. In other words, it is argued that the petitioners have no standing to raise the questions whether the Administrator is in fact violating a Federal statute under which he assumes to act, or whether that statute is void and consequently no justification of his action. The argument of respondents rests (1) upon a misconception of the law, and (2) upon a misstatement or misinterpretation of the facts.

Respondents rest their legal position upon *Poindexter v. Greenhow*, 114 U. S. 270 and upon *Ex parte, Ayers*, 123 U. S. 443. In so doing they have, we think, confused the questions (1) whether a citizen has an interest which entitles him to maintain a suit, and (2) whether, conceding the existence of that interest, the suit is nevertheless not maintainable as one against the United States. In the Ayers case the sole question was whether the suit was in fact against the State of Virginia, although in form against certain individuals who were State officers. No question was raised or considered whether the complainants in the underlying suit out of which the *habeas corpus* action arose had any standing to maintain the suit, whatever its character. The question which the respondents really debate is under what circumstances a suit is one against a State or the United States so as not to be maintainable without its consent regardless of the justiciable interest of the complainant. All the cases cited by respondents involve either (1) the question whether under the facts of the particular case the suit, though in form against an officer, was in fact against the United States so as to make the United States an indispensable party; or (2) whether the act of the defendant official, charged to be unconstitutional or in excess of statutory authority, threatened any substantial special injury to the complainant. *Morrison v. Work*, 266 U. S. 481, 486, 488; *Frothingham v. Mellon*, 262 U. S. 447.

The fact is, that in practically every instance the only substantial threat of injury arises from the fact that the defendant is attempting unlawfully to use the power of the State or the Nation so as *irreparably* to injure the property or personal rights of the complainant. Viewed in that aspect, it would always be possible to say that the act would not be effective except through the use of power of the State or the Nation and that, therefore, it must be regarded as an official act and a suit against the State or Nation, and, therefore, not maintainable. And viewed purely as the act of a private individual

not acting under color of office or statutory authority, there would ordinarily be no substantial threat of injury.

In any event, the compelling necessity, that only by permitting suits against Federal officers could the constitutional rights of citizens or our constitutional form of government be preserved, led to the adoption of the practical view and the realistic principle that such a suit is against the officer as an individual or in his private capacity and not against the nonconsenting State. To construe that principle in such a fashion as to defeat the purpose for which it was developed would obviously be inadmissible; and whatever may be the refinement of underlying legal theory, the principle is well settled that whenever an officer undertakes under color of a State or Federal statute to use the power of the State or Nation unlawfully and unconstitutionally so as to inflict or threaten a special and irreparable injury upon the property or rights of the citizen, that citizen may turn to the courts for redress. The respondents, we think, concede away their whole argument on this point when they attempt to distinguish cases like *Philadelphia Co. v. Stimson*, 223 U. S. 605 and *Ex parte Young*, 209 U. S. 123, by arguing that a private individual could be sued under the circumstances there presented if authorized by statute to do the act complained of. (Admr. Br. in Nos. 84 and 85, p. 96. But obviously the power exerted by such an individual is the power of the State or Nation as conferred by the statute—the same power as that exerted by an officer, if in fact such an individual is not at least a de facto officer. Without this power the individual could not be sued as there would be no threat of injury. Whether the question at issue is one of the right to sue or whether the suit is against a nonconsenting sovereign, the respondents concede, as they must under repeated decisions of this Court, that where an individual is threatening unlawfully and unconstitutionally to use the power of the State or Nation to inflict an irreparable injury upon the citizen, the citizen has a right to redress. It is difficult to see why the

threat to use the *power* of the State may be restrained but the threat to use the *money* of the state to inflict a like injury is immune!

In *Philadelphia Co. v. Stimson*, supra, the defendant was charged (1) with creating a cloud upon the title of complainant's real estate by acting in excess of statutory authority or under an unconstitutional statute in laying out harbor lines at Pittsburgh, and (2) with threatening to bring criminal prosecutions in the name of the United States if the complainant used its property in disregard of such pretended harbor lines. Manifestly, treating the suit as one against a private individual, apart from, in disregard of and unaffected by his official position and duty or his ability as a Federal officer to bring to bear the power of the Federal Government, the fact that he, as a private individual, had purported to promulgate harbor lines at Pittsburgh could constitute no cloud upon the complainant's title. Under a similar assumption, any threat that he would prosecute the complainant criminally in the name of the United States would have been equally fanciful and would have stated no cause of action. But the fact that this was not the act or threat of a private individual, but the act and threat of a public officer having the means and the announced intent by virtue of his office to pervert and bring to bear the powers of Government to injure or destroy the rights of the citizen, did give the citizen a standing to challenge the defendant's action. The rule of the *Stimson* case has been frequently applied in this Court and the lower Federal Courts. *Pierce v. Society of Sisters*, 268 U. S. 510; *Truax v. Raich*, 239 U. S. 33; *Public Service Co. v. Corboy*, 250 U. S. 153, 159; *Looney v. Crane Co.*, 245 U. S. 178, 191; *Hammer v. Dagenhart*, 247 U. S. 251; *Hill v. Wallace*, 259 U. S. 44; *Chastleton Corp. v. Sinclair*, 264 U. S. 543; *Wilson v. New*, 243 U. S. 332; *Fort Smith and Western Ry. et al. v. Mills*, 253 U. S. 206; *Street v. Lincoln Safe Deposit Co., et al.*, 254 U. S. 88; *Lion Laboratories v. Campbell, Federal Prohibition Administrator*, (C.C.A. 2, 1929) 34 F. (2d) 642.

The two greatest powers of government are "the sword and the purse." *McCulloch v. Maryland*, 4 Wheat. (17 U. S.) 316, 407-8. Here the defendant Administrator, by virtue of his power under the statute, threatens to use the "public purse"—to bring to bear the weight of the public Treasury—to accomplish the irreparable injure if not destruction, of the property and business of the petitioner. He threatens to use the force of one of the two greatest powers possessed by the Federal Government in such a fashion as unlawfully and unconstitutionally to inflict an irreparable injury upon the property rights of the petitioner. Hence, even on the respondents own theory, the right of the petitioner to sue is plain.

The theory of the respondents is untenable for the further reason that it rests upon a misstatement or misinterpretation of the facts. It proceeds upon the assumption that in a suit against an officer to enjoin unconstitutional action, the complainant must show that if the officer were doing the thing complained of as a private individual and without making any use of the powers of government, he would be liable.[1] This would not only require the Court to assume a non-existent case and disregard the facts but also to substitute falsehood for fact. The question before the Court for determination is whether the defendant Administrator may so use and pervert the powers of government and not what he might do as a private individual. The Administrator is not in fact giving his own money away. He is in fact using money out of the Treasury of the United States. Yet the Court is asked to treat the Administrator's action the same as though he were taking his private funds to make a gift or to engage in a legitimate enterprise. To say that the case should be treated as merely stating a case against the Administrator for giving away his own

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1) This, as hereinafter shown, involves not merely assumptions contrary to the fact but also the thesis that one who undertakes to perform the obligations of a public office thereby assumes no duty, even in relation to the discharge of the functions of his office, which does not rest upon him as an individual in the conduct of his personal affairs.

money would be to ignore and utterly disregard all constitutional limitations imposed on public officials for the protection of the citizen and his property rights. The Court is asked to place itself in the position of assuming fiction for fact to the end that one who has assumed a public office and sworn to obey the Constitution of the United States shall not be called to account for the violation of his duty. The growth of bureaucracy and the insistence of bureaucracy that citizens have no right to demand an explanation or a justification for the taking of their property or the invasion of their rights is perhaps the most disturbing trend of modern government.

Respondents' application of Their Theory of the Nature of a Suit Against a Federal Officer to the Case at Bar.

Relying upon their erroneous proposition that it is necessary for petitioner to state a cause of action against the Administrator individually in order to maintain this action, respondents then argue that as petitioner cannot complain of lawful competition by Greenwood County, petitioner is without standing to sue. This argument proceeds upon a misstatement of the facts, the basis of the suit and the relief sought. The Bill did not seek to prevent lawful competition by Greenwood County and a decree in petitioner's behalf would leave the County as free to thereafter engage in lawful competition as it was before. The object of this suit and the scope of the decree sought are merely to enjoin the respondents from unconstitutionally and illegally taking money out of the Treasury of the United States to subsidize the construction of a competing utility in Greenwood County.

While petitioner has no right to be free of lawful competition by Greenwood County, it does not follow that the petitioner has no right to be free from damage caused and made destructive by the unconstitutional gift and loan of Federal funds. Because petitioner has no right to be free from damage by lawful competition by Greenwood County, it does not

follow that petitioner has no standing to have the other question determined. If petitioner's special injury is proximately caused by the use of Federal funds, it clearly has the right to have the validity of such use determined. The respondents do not attempt to meet the argument in petitioner's brief that the Administrator's action is the cause of the admitted injury or damage to petitioner, (Pet. Br. 72-77) nor can they avoid the findings by the district court both on the original hearing and on the retrial, that the Greenwood project would not be built were it not for this aid to be supplied by the Administrator. Likewise respondents wholly fail to meet the argument in the petitioner's brief which clearly shows that where, as here, one commits an unlawful act, he may not escape liability for injuries inflicted upon a third party because he has utilized an intervening agency which would have had the right, uninfluenced by his unlawful act, to do the thing which caused the damage. None of the cases cited on pages 66-68 of the Administrator's brief in Nos. 84 and 85 are apposite to the question under discussion. If the petitioner were seeking to enjoin Greenwood County from entering into competition, such cases would be relevant but here they can only serve to confuse the issue. That the cases cited by the Administrator on pages 78-82 of his brief in Nos. 84 and 85 do not support his position has already been pointed out by petitioner. (Pet. Br. pp. 83-6).

Nor do the National Bank Cases cited by the respondents sustain their position. In those cases the plaintiffs were denied the right to put in question the charter authority of the banks. As stated in *Schuyler National Bank v. Gadsden*, 191 U. S. 451, the point at issue as to each bank was "the question as to the violation of its charter" and could be raised only by the government in a direct proceeding for that purpose. This limitation of those entitled to raise the question of ultra vires under a corporation charter was also the question involved in *Railroad Company v. Ellerman*, 105 U. S. 166. (Pet. Br. pp. 83-4).

Relying upon these cases respondents argue that the petitioner has no right to sue because, as they contend, the petitioner would have no right of action against the Administrator if he, acting as the president of a bank or railroad, would make a loan and gift to Greenwood County in excess of his powers or of the powers of the bank or railroad and that the same principle applies to unconstitutional action by a Federal officer as to the ultra vires act of a corporation or a corporate officer. That conclusion is a plain *non sequitur*. The argument requires the Court either (1) to pretend that it is considering the right of the petitioner to question a gift or loan of the funds of the Administrator or a private corporation instead of the right of a citizen to redress for special injury caused by the unconstitutional use of Federal funds; or (2) to hold that no right of petitioner is violated when the Administrator unlawfully exerts the powers of the government in such a way as irreparably to injure petitioner's property. The distinction between the duty of a Federal officer, exerting the powers of the government, and the duty of a private corporation, its officers and directors, not to act in excess of charter limitations, is too obvious to be confused.

The respondents wholly fail to distinguish *Pierce v. Society of Sisters*, 268 U. S. 510, and similar cases. In these cases they confuse the issue of the unlawfulness of the threatened action with the question of whether that action would be the proximate cause of the plaintiff's injury. In the Pierce case, the State officers were threatening to use the power and force of the State unlawfully and in such fashion as to bring about an injury to the complainant. Here the defendant Administrator is threatening to use the power of the Federal Government. In the Pierce case, the threat of the defendants to bring criminal and other proceedings against the parents of school children in the name of the State, would have constituted no actionable wrong had the defendants not been State officers and in a position to carry out their threats under color of such office. Similarly here, the act of the de-

fendant Administrator in selecting the plant for construction as a public works project and his threat to take $2,800,000 out of the Federal Treasury and give it to Greenwood County with which to construct the competing plant would state no cause of action but for the fact that the Administrator is in a position, under color of office, and under color of an unconstitutional statute, to make his action effective.

II.

The two lower courts did not find against petitioner's contention that the project was approved as a Public Works Project and funds allotted for its construction for the unauthorized purpose of reducing local electric power rates; and the rule as to a concurrent finding by two lower courts cannot be invoked by Respondents.

Counsel for the County and its officials contend "that where the findings of fact by a District Court are concurred in by the Circuit Court of Appeals they will not be *reviewed* by this Court, and will be accepted unless clear error is shown." (County's Br. pp. 4, 5; Italics Supplied).

Counsel for the Administrator rely upon "the established practice of the court *** (that) concurrent findings will not be *disturbed* unless clear error is shown." (Administrator's Br., p. 29; Italics Supplied).

Counsel for the Administrator, go further, saying:

> "Indeed, it is doubtful whether petitioner, in view of its limited specification of errors, is in a position to raise any question with respect to the findings of fact." (Administrator's Br., p. 29).

These positions, we submit, are untenable for the following reasons:

FIRST. There was no concurrent finding of fact by the two lower courts against petitioner's contention that the reduction of local electric power rates was the controlling consideration

and determining factor in the approval of this project by the Public Works Administration, and in the allotment of funds for its construction.

On the contrary, as we pointed out in our opening brief, (pp. 29-32), the trial court found that the project was approved and the allotment made pursuant to the PWA power policy to force down rates. (R. 774).

Judge Glenn first stated petitioner's contention as follows:

> "The plaintiff contends that the evidence is admissible because it tends to show that the Administrator and his assistants, charged with large responsibility, had adopted a course whereby they set up the rate question as a criterion to determine whether or not a loan and grant should be made in a specific case." (R. 772).

He then definitely and categorically stated:

> "Regardless of its effect on the final decision of the case *we think that the evidence in this regard is admissible and that it shows exactly what the plaintiff contends that it shows.*" (R. 774) (Italics supplied).

As we endeavored to point out in our opening brief, his findings on page 788 of the record is, and—in view of the clear and unqualified statements contained in his opinion—must be construed (construing it most favorably to respondents) as—a mixed finding of fact and conclusion of law, based upon a supposed change in the power plan of the Administrator which, if it ever occurred, occurred long subsequent to the approval of this project and the allotment of funds for its construction; and upon the Judge's apparent view that this supposed change could be given the retroactive effect of curing the illegality of the action of the Public Works Administration in this case which took place long prior to the supposed change.*

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* The importance and significance of the opinion of a district court in disclosing the grounds of its decision is stated and emphasized in Virginian R. Co. v. United States, 272 U. S. 658, at page 675.

As we further endeavored to point out, there was no such change. And if there had been a change it could not be given the retroactive effect of curing the prior action in this case. There was no new approval of the project and no new allotment of funds for its construction after the supposed change. As Judge Glenn found, the determining factor in the approval of this project, and in the allotment of funds for its construction, was the reduction of rates. It was approved and the funds allotted during the period when, as he found, the rate test was the controlling consideration. (R. 773-4).

SECOND. Not even the majority opinion of the Court of Appeals, as we read it, found against petitioner's contention with respect to the controlling consideration and determining factor which governed the Public Works Administration in approving the instant project and in allotting funds for its construction.

On this point the majority of the Court of Appeals said, at page 855 of the record:

> "It is the contention of plaintiff that the loan and grant were made to the county by the Administrator for the purpose of affecting the rates charged by plaintiff for electric power, and at all events, that the inevitable effect of the construction of the project will be to lower rates in the territory in which plaintiff operates; and much testimony was adduced as to the policy of the Public Works Administration in approving loans and grants for power projects. As to this it appears that the Electric Power Board or Review which was set up in 1933, but which was abolished by order of the Administrator on March 16, 1935, did have a policy with respect to approving loans to municipal power projects to the effect that such projects should meet standards of social desirability, as well as engineering soundness and reasonable security. Social desirability, under this policy, depended among other things upon whether or not the municipal project would provide current at rates substantially less than

those at which it was provided by an existing utility; and, in cases where such utility would lower its rates to meet those proposed by the municipality, the policy was not to approve the municipal project."

Again, on page 856, the majority said:

"that, in the beginning, much emphasis was placed upon the social desirability of lowering power rates to the public; but that, after the policy of the Public Works Administration had been attacked on the ground that, by attempting to bring about lower power rates, it was interferring with a matter reserved to state control, this emphasis on 'social desirability' of lower rates has been largely abandoned and the consideration of competitive rates has been had with reference to the financial security of the loan rather than the 'social desirability' of the enterprise, the lowering of rates being regarded as an incidental result of the policy of making such loans and grants and not as one of the chief purposes thereof."

Thus the majority of the Court could not escape the conclusion, so clearly established by the record, that the rate test was the determining factor with the Public Works Administration in the approval or disapproval of competing municipal power plants, certainly at the time of the approval of the instant plant.

The statement on page 856, that subsequent to the approval of the instant plant emphasis was taken off "the social desirability of lowering power rates to the public," and the same objective accomplished by "the consideration of competitive rates * * * with reference to the financial security of the loan," merely indicates a variation in the method of accomplishing the same objective.

On this point the accuracy of what Judge Soper said, in the paragraph of his opinion beginning at the bottom of record page 875, although contained in a dissenting opinion, cannot be successfully challenged. Judge Soper there said:

"It is true that since the decision of Judge Watkins in the court below, 10 F. Supp. 854, 12 F. Supp. 70, and the decision in *Arkansas-Missouri Power Co. v. City of Kennett*, 78 F. (2d) 911, which pointed out the illegality involved in the practices of the Administrator, an attempt has been made to repudiate the public statements concerning the policies of the Administration, which had been frequently and publicly made by subordinate officials; but these statements conformed so closely to the announcements of the Administrator that the attempt to abandon them amounts to little more than an expression of regret that what had been so widely proclaimed as a praiseworthy public policy had become a source of danger to the establishment of municipal power projects. The District Judge found that there was in fact a change in the policy of the Administrator after he became doubtful of the validity of his prior acts, but so far as the proposal of Greenwood County is concerned, *there was no change that affects the finding of fact that it was approved because it met the requirement that it would bring down the rates of the established local utility.* The original contract of December 8, 1934 was revised on November 30, 1935, so as to include a paragraph denying to the Administrator and the Government the right or power to govern the rates to be fixed or charged for the services afforded by the project, excepting such rights as the Government might have as a holder of the municipal revenue bonds; but no new application for the loan and grant was made by the County, no new resolution of approval of the project by the Public Works Administration was given, and no change was made in the rates to be charged by the projected plant which had been adopted prior to the execution of the first contract and had received the approval of the Administrator. In

> fact, the County adopted a new resolution on December 6, 1935 by which the original rates were confirmed. The change in the contract was obviously made to meet, if possible, the legal objection that had been raised; but no change was made in the unauthorized and invalid condition upon which the proposal had been approved." (Italics supplied).

THIRD. Furthermore, Judge Glenn, in making the finding or conclusion relied on by respondents, seems to have adopted the legal contention of respondents that even though the allotment was made pursuant to "a well thought-out plan * * * to control rates," this would not render the action of the Administrator invalid. (R. 774). We endeavored to answer this contention in our opening brief. (pp. 41-2).

Respondents in their brief, in support of this contention, rely upon *Sonzinsky v. United States*, 300 U. S. 506, and the line of cases of which it is representative. These cases merely hold that the court in passing on the validity of a statute within an acknowledged power of Congress will not consider the reasons which may have influenced Congress and its members in passing the statute. No such question is here presented. The question here is whether the Administrator is acting within the confines of the authority delegated to him by Congress. Congress delegated the authority granted the Administrator and appropriated the funds placed at his disposal for the accomplishment of the national purpose of relieving unemployment. This purpose is clearly declared in the statute. It is on the theory that the pursuit of this purpose will promote the general welfare of the nation that constitutional sanction for the statute is asserted. Admittedly the statute would be unconstitutional, if enacted for the purpose of reducing local electric power rates. The Administrator, we submit, in exercising the discretionary power delegated to him, and in using the funds placed at his disposal, must pursue the declared statutory purpose only. He cannot lawfully pursue

the unauthorized purpose of reducing local rates. Nor can he lawfully make the reduction of local rates a standard to guide him in the exercise of his discretion. That is an unlawful standard. Congress itself could not lawfully have made it a standard. And when his discretion is guided by that standard, his discretion is unlawfully exercised and his action invalid.

The contention of respondents, we think, comes down to this: that the Act permits the Administrator to use the funds appropriated and placed at his disposal for the accomplishment of any purpose that he, in his uncontrolled judgment, may deem advisable, provided only that he does create some work and give some employment. If this be true, and if the Act as so interpreted be constitutional, then the power of economic intervention into the affairs of private business, local as well as national, would for all practical purposes be unlimited. Such, we submit, is not the law. We think it is essential to the validity of a statute delegating discretionary power to an executive or administrative official that somewhere in the statute Congress prescribe adequate standards to guide and control the official in the exercise of the power delegated to him, and that the standards prescribed must be lawful standards, and must relate to a purpose within the constitutional reach of the federal government. If these standards are not expressly stated and prescribed in the statute, they will be found in the expressed purpose of the statute; when this purpose is expressed it is controlling, and the pursuit of any other purpose, unrelated to the statutory purpose, is unauthorized.

We think the true principle in construing a delegated authority is that it confers only a limited power on the grantee and that, especially where private property rights become involved, it is the duty of the courts to decide whether the grantee has acted within the limits of the delegated authority. It is true that private interests must within constitutional

limits give way to the public interest; but the public interest is seriously injured by acts which, though apparently in its favor, lead to the destruction of private interests and to individual injustices.

Respondents further contend that petitioner is seeking to invalidate the Administrator's action on account of his personal motive. Petitioner takes no such position. It does not suggest that the Administrator was actuated by any ill-will toward it; and it may be conceded that if his action were otherwise valid it would not be rendered invalid by any such ill-will, even if it existed.

The position of petitioner goes to the Administrator's authority to use the power delegated to him and the funds placed at his disposal for the unauthorized purpose of reducing power rates. See Judge Soper's opinion R. 877.

In *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, the petitioner there did attack the order there involved on the ground that it had been prompted by improper motives on the part of the official issuing the order. The court held, "*if the order is justified by a lawful purpose*, it is not rendered illegal by some other motive in the mind of the officer issuing it." Petitioner here contends that the Administrator's action was not "justified by a lawful purpose." We repeat that petitioner does not even suggest the existence of an improper motive.

FOURTH. The contention that petitioner's specifications of error do not raise any question with respect to the findings of fact is untenable.

Petitioner duly assigned error to the trial court's findings of fact (R. 809-811); as well as to the failure of the trial court to make requested findings of fact (R. 811-814); and particularly assigned error to the trial court's finding No. XVIII on which respondents rely. (R. 810).

Petitioner in its petition for a writ of certiorari, in stating the specification of errors intended to be urged, stated:

"The errors assigned and intended to be urged by petitioner, should their petition be allowed, are set forth in their assignments of error. (R. 810-819, 831-2). The errors assigned raise the questions set forth in the foregoing statement of the questions presented." (p. 11 of Pet.).

In its opening brief petitioner stated that it "intends to urge the errors specified in its petition for writ of certiorari."

Certainly it was not necessary for petitioner to say that the questions were presented in their *factual aspects* as well as in their legal aspects. Of course they are presented as much in one aspect as in the other. The case is a suit in equity, and the writ of certiorari brings up the entire record for the review of the questions presented, the review extending to matters of fact as well as to matters of law. *Virginian R. Co. v. United States*, 272 U. S. 658, 675, 71 L. Ed. 463, 472; *Keller v. Potomac Electric Power Co.*, 261 U. S. 428, 444, 67 L. Ed. 731, 736; *Darlington v. Turner*, 202 U. S. 195, 50 L. Ed. 992; *Beyer v. Le Fevre*, 186 U. S. 114, 119, 46 L. Ed. 1080, 1082.

It may be noted further that both the petition for certiorari (p. 4), and petitioner's opening brief (p. 12), states that the Court of Appeals, in its holdings on the questions presented, erred "in the circumstances disclosed by the record." Furthermore, we think counsel for the County are in error in stating that this court will not *review* a finding of fact concurred in by two lower courts. This court has jurisdiction to review, and will review, such a finding in an equity cause. It will not, however, as we understand the rule, "disturb" such a finding unless error is shown either because the finding was based on an erroneous rule of law, or on an erroneous application of a correct rule, or was clearly against the weight of the evidence, but the court must *review* the finding in order to ascertain whether it is subject to any of these infirmities. It is this kind of review that petitioner seeks, if the findings of the lower courts may be interpreted as adverse to it.

III.

The Administrator's use of federal funds to construct a local hydro-electric plant in Greenwood County, S. C. is not within the powers conferred upon the Federal Government by the General Welfare Clause and is prohibited by the 10th Amendment.

The respondents here again attempt to avoid the issue by arguing the question whether Congress has power to appropriate Federal funds under the general welfare clause to relieve a national condition of unemployment. That issue is not here involved and the power is not questioned. But that end must be reached by constitutional means and methods; and the method under examination in this case is not constitutional. It must be remembered that the power to make appropriations for the general welfare is not an affirmative power to do anything. It is a power to appropriate and nothing more. To construe the provisions respecting taxation as authorizing any Federal governmental action involving the expenditure of tax monies that would have the indirect effect of promoting the general welfare, regardless of the means employed, would in effect make the general welfare clause a general grant of power and would open the door to wide encroachments on purely state affairs. For if the power to appropriate for the general welfare were construed as embracing an unfettered discretion in Congress to select any means to the end, the door would be opened leading directly to the serious impairment and ultimate destruction of the separate existence and independent self-government of the states. That this power cannot be so construed is well-settled. *United States v. Butler*, 297 U. S. 1.

In our previous brief we have shown that even though the general welfare clause be construed to authorize appropriations not in furtherance of the enumerated pow-

ers, the power of taxation and appropriation may nevertheless only be exercised for general not local, national not state, and public not private purposes, that mere multiplication of Federal excursions into matters of strictly local concern cannot convert them into matters of national concern or general welfare, and hence constitutional objects of Federal appropriations, that whether the object of such an appropriation is a constitutional Federal purpose must be determined by the nature of the *direct* object of the appropriation and not by any *indirect* or incidental effect and that under these principles the instant appropriation does not fall within the power given to Congress by the general welfare clause.

The argument of the respondents is based upon the simple expedient of inverting the direct object and the incidental effect of the appropriation under examination. It treats the claimed incidental effect of relieving unemployment as the direct object of the appropriation and the actual direct objective, that is, the construction of the intrastate utility, as an incidental and indirect effect. The position is manifestly untenable. No case cited by the respondents holds that the validity of an appropriation is to be determined by its indirect and incidental effects rather than its direct object. Nor can the respondents avoid the issue by charging, as they do, that the petitioner contends that no expenditure could be justified as in aid of the general welfare if made locally. It is unnecessary to say that the validity of the expenditure is not determined by the locality in which it is made but by the nature of the direct object of the expenditure. This again is a confusion and inversion of the direct object and the indirect and incidental effects of the appropriation and expenditure under examination. Nothing is more important than to maintain unimpaired the fundamental principle that the authority for all Federal action must be determined by its direct

object and not by incidental or indirect effects; for otherwise our dual constitutional system will be destroyed and merged in a central government of unlimited powers. *Schechter Corp. v. United States*, 295 U. S. 495, 546-8; *United States v. Butler*, 297 U. S. 1.

The respondents in form recognize the holding of this Court in *United States v. Butler*, 297 U. S. 1, that the spending power may not be used in such a fashion as to exercise any of the powers reserved to the States. But they attempt to avoid the effect of that decision upon the ground that the undertaking of the County is entirely voluntary. The question however, is whether the Federal Government is exercising powers reserved to the States and not whether it is exercising such powers with or without the consent of the State. Thus if the Federal Government would offer to pay every State $100,000,000 annually, if the State would surrender part or all of its reserved power, the acquiescense of a State would not defeat the Tenth Amendment and compel its citizens to submit to this exercise of Federal power forbidden under the Constitution.

The situation is in no way analogous to *Massachusetts v. Mellon*, 262, U. S. 477, as claimed by the respondents. That case dealt with a State which had never accepted the Federal offer. This case deals with the right of a citizen to immunity from an unlawful exercise of federal power.

Finally, the respondents attempt to justify the expenditure upon the ground that numerous appropriations, claimed to be similar to the instant one, have been made in the past. Many of the various types of appropriation listed by the Administrator were clearly for national objects, such as appropriations for forest fire prevention, public highways and the like. But in any event, such appropriations are without significance because their constitutionality was never tested in the courts. *United States v.*

Butler, 297 U. S. 1, 73. And certainly the argument fails to meet the objection here that the appropriation is being used for a purely state function and will result in the invasion of a field forbidden to the Federal Government by the Tenth Amendment.

IV.

The Commerce Clause, U. S. Constitution, Article I, Section 8, Clause 3, furnishes no constitutional basis for the Establishment of the project under color of the Authority of the National Industrial Recovery Act as proposed.

Counsel for the County take the position that the project will constitute an improvement of the Saluda River in aid of navigation, that it would affect interstate commerce, and hence that its establishment with federal funds, as contemplated, may be justified under the commerce clause, U. S. Constitution, Article I, Section 8, Clause 3. In support of the argument they call attention to the license issued by the Federal Power Commission permitting the construction of the project.

The argument, of course, must be predicated on the assumption that it is the Administrator who is seeking to establish the project, because manifestly the County, itself, would have no authority under the state statutes to construct a project in aid of interstate navigation.

We do not think, however, that the project can be classed as a navigation project, because all the evidence shows that it would be established for the sole purpose of engaging in the power business in the three Counties of Greenwood, Newberry and Laurens. It is true that a license has been obtained from the Federal Power Commission, but this license is merely a "permissive grant," and "is not a privilege to be exercised on behalf of the government." *Broad River Power Company v. Query*, 288 U. S. 178; *Susquehanna Power Company v. State Tax Commission*, 283 U. S. 291.

Saluda River itself is not navigable but is merely a tributary of waters below claimed to be navigable; and the purpose of the license was not to authorize the construction of a project in aid of navigation, but to permit the establishment of a power plant subject to such conditions as would prevent or minimize any possible injury to the navigable capacity of the streams below, and "protect the interests of the interstate and foreign commerce that would be affected." (See *Appalachian Electric Power Co. v. Smith*, 4 F. Supp. 6, 17, 67 F 2d 451, and cases cited.

The certificate of the Federal Power Commission (Respondent's Exhibit 4, R. 402), describes the project as "a waterpower project at the Buzzard's Roost site on the Saluda River, affecting lands in Greenwood, Newberry and Laurens Counties, South Carolina;" and the certificate further states:

> "It appears from the foregoing statements and quotations that the Saluda River is not navigable waters of the United States within the meaning of Section 3 of the act. It is unquestionably a non-navigable stream at and above the Buzzards Roost dam site and below the dam site to the head of the existing Saluda Reservoir (Lake Murray). There are no navigation locks at the Saluda Dam. The discharge at the Buzzard Roost site is estimated as ranging from a minimum of about 200 c.f.s. to a maximum of about 55,000 c.f.s. *The small low-water flow and the steep slope of the stream seem to preclude serious consideration of its improvement for navigation.*" (Italics supplied) (R. 404).

The certificate of the Power Commission contains no requirement of the installation of any facilities in aid of navigation.

The real purpose being to construct a power plant, the "permissive grant" or license of the Federal Power Commission cannot be successfully put forth in justification of the undertaking of the Administrator to construct the project with fed-

eral funds on the pretext that it would be a river improvement in aid of navigation.

But if the project could be classed as a navigation project, or as a combined navigation and power project, then it cannot be lawfully constructed under Title II of the National Industrial Recovery Act, because Sec. 202 of the Act (40 U. S. C. §402) contains the express provision "that no river or harbor improvments shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army."

Respondents introduced in evidence as their Exhibit No. 5 House Document No. 96, 73rd Congress, First Session (R. 406). This document contains a report from the Chief of Engineers to Congress on the Santee River system which embraces the Saluda River on which the Buzzard Roost project would be constructed. The report, therefore, includes and deals with the Buzzard Roost project (Page 69 of the report). The report was made to Congress under the provisions of House Document 308, 69th Congress, first session.

The Chief of Engineers did not recommend the development of Buzzard Roost as a navigation project.

The recommendations of the Division Engineer, as set forth on page 10 of the report, are as follows:

> "The navigable reaches of the Santee River and its tributaries are not in need of further improvement than is provided for by existing projects. The problem of flood control is local in character and does not affect Federal Interests. The cost of effective flood-control measures is larger than is economically justified. Future power development will have a beneficial effect on reducing flood heights. A number of undeveloped power sites in the upper watershed have economic value for commercial development, but Federal participation therein is not warranted. There is no need for irrigation. Further improvement by the Federal Government of the Santee Riv-

er and tributaries for navigation, flood control, power development, or irrigation, other than that already provided for by existing projects, is not recommended."

The report of the Division Engineer was in general concurred in by the Board of Engineers for Rivers and Harbors and by the Chief of Engineers; (page 3 of the report) and the recommendation of the Chief of Engineers, himself, is set forth on page 4 of the report where he states, "I am of the opinion that no improvement of this stream for navigation, either alone or in connection with power development, flood control, or irrigation, or any combination thereof, other than as authorized by existing projects, should be undertaken by the United States at the present time."

It would, therefore, seem to be plain that, if the project can be classed as a navigation project or as a combined navigation and power project, then, it neither having been adopted by Congress nor recommended by the Chief of Engineers, the action of the Administrator in seeking to establish the project under color of the authority of Title II of the National Industrial Recovery Act, is contrary to the express proviso contained in Section 202 of the Act which we have quoted.

This question has been so recently and fully dealt with by this Court in the case of *United States v. State of Arizona*, decided April 29, 1935, 295 U. S. 174, that extended discussion is unnecessary.

In that case, as stated in the opinion, the United States, acting through Harold L. Ickes, Secretary of the Interior and Federal Emergency Administrator of Public Works, had entered into a contract with the Metropolitan Water District of Southern California for the construction of Parker Dam on the Colorado River. The State of Arizona objected to the con-

struction of the dam and threatened to use force to stop the work. Whereupon the United States filed a bill in equity in the Supreme Court, perpetually to enjoin interference by the State. The question at issue was whether the Administrator had lawfully entered into the contract for the construction of the dam.

Among other statutory provisions relied upon by the United States in support of its claim that the dam was being lawfully constructed, was Section 202 of the National Industrial Recovery Act. The opinion states that:

> " . . . it is asserted that the Parker Dam project has been included by the Administrator in the comprehensive program of public works authorized by section 202, National Industrial Recovery Act, 48 Stat. 201 (40 USCA §402); that, pursuant to that Act, the Chief of Engineers of the United States Army has recommended the construction and his recommendation has received the approval of the Secretary of War."

The Court disposed of this contention as follows:

> "5. Plaintiff's contention that the dam is being built under authority of the Recovery Act is without force.
>
> *"The chronology just given,* when taken in connection with the citations in the contract of the Acts relied on, *shows the claim to be an afterthought born of the controversy disclosed by the complaint and about to be here submitted.* Section 25 of the Act of April 21, 1904, does not authorize this dam. Plaintiff does not assert that it was otherwise adopted by Congress." (Italics supplied).

It will be noted that in the Parker Dam case, the Chief of Engineers had recommended the construction of the dam, but the recommendation was made to the Administrator instead of to Congress. The Court held that this recommendation did not comply with the requirement of the National Industrial Recovery Act, because when that act was passed the phrase "recommended by the Chief of Engineers," when used in Acts of Congress relating to river and harbor improvements, had a well understood and definite technical meaning; that it meant a recommendation made to Congress only after preliminary examinations followed by surveys, the making of which examinations and surveys Congress had previously directed.

In this case, the Chief of Engineers has made a report on the Buzzard Roost development as a navigation project. The report was made to Congress after an examination and survey made under the direction of Congress and the recommendation is that "no improvement of this stream for navigation, either alone or in connection with power development, flood control, or irrigation, or any combination thereof, other than as authorized by existing projects, should be undertaken by the United States."

As a navigation project or river improvement, plainly it cannot lawfully be constructed under color of the authority of the National Industrial Recovery Act.

As a power project it cannot be brought under the commerce clause because it would be a strictly local enterprise and would engage solely in intrastate business. (R. 267, 175).

CONCLUSION

For the reasons set forth in our opening brief and in this brief, it is submitted that the decree of the Circuit Court of Appeals should be reversed, and the cause remanded to the District Court with directions to enter a decree for the petitioner permanently enjoining the respondents from using any funds of the United States to construct the electric power plant described in the bill of complaint.

Respectfully submitted,

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December 6, 1937.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No.----------

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY,

Petitioners,

— *vs.* —

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR RESPONDENTS, GREENWOOD COUNTY AND ITS FINANCE BOARD IN OPPOSITION TO THE PETITION FOR CERTIORARI.

STATEMENT.

This Bill in equity was instituted November 7, 1934, in the United States District Court for the Western District of South Carolina against Greenwood County and the members of its Finance Board. Harold L. Ickes, as Federal Emergency Administrator of Public Works, intervened,

was permitted to become a party defendant (R. 65) and filed his answer in the cause (R. 66-94). Motions by the County and by the Administrator to dismiss the Bill were refused (10 Fed.Supp. 854; R. 117-153). After testimony was taken, the District Court granted an injunction preventing the construction by the County of the proposed hydro-electric project with Federal funds (12 Fed.Supp. 70; R. 477-485).

The defendants appealed to the Circuit Court of Appeals, which Court, upon motion and showing by the Administrator that since the taking of the appeal the original contract between Greenwood County and the Administrator had been terminated and a new contract substituted, remanded the cause for the taking of testimony under the changed circumstances (79 F.(2d) 995; R. 515-18).

The District Court, after taking further testimony, entered a second Decree refusing to vacate the original Decree of injunction (R. 527-8). From this Decree appeal was again taken to the Circuit Court of Appeals, which Court reversed the Decree of the District Judge and ordered the Bill dismissed (81 F.(2d) 986).

This Court granted a Writ of Certiorari to the Circuit Court of Appeals (298 U.S. 651) and the cause was argued at the October Term, 1936. The Court, by its opinion (299 U.S. 259) declined to pass on the merits of the case for the reasons stated in the opinion, reversed the Decree of the Circuit Court of Appeals and remanded the cause with directions that the Decrees entered by the District Court be vacated; that the parties be permitted to amend their pleadings in the light of existing facts, and that the cause be retried upon the issues thus presented.

The District Court vacated the former Decrees (R. 541-2) and after supplemental pleadings had been filed by the parties (R. 543-8) proceeded to a hearing upon the merits. The Court upheld the validity of the loan and grant and dismissed the Bill (R. 799-800), filing a full opinion (R. 744-778) as well as separate findings of fact and conclusions of law (R. 779-799).

Upon appeal to the Circuit Court of Appeals the judgment of the District Court was affirmed (___ F.(2d) ___; R. 848-873).

Plaintiffs now petition this Court for a Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit for a review by this Court of the entire cause.

QUESTIONS INVOLVED.

The questions which plaintiffs seek to present for the determination of this Court may be stated as follows:

1. Did the Circuit Court of Appeals err in holding that Title II of the National Industrial Recovery Act is constitutional, is not violative of the 10th or 5th Amendments, and does not unlawfully delegate legislative powers to the Executive Department of the Government?

2. Did the Circuit Court of Appeals err in holding that the Public Works Administrator was acting properly within the authority conferred upon him by Title II of the National Industrial Recovery Act in making this loan and grant to Greenwood County?

3. Did the Circuit Court of Appeals err in holding that the plaintiffs have no standing to question the legality of the making of this loan and grant even if Title II of the National Industrial Recovery Act be unconstitutional or the Acts of the Administrator be unauthorized?

ARGUMENT.

It is the position of Greenwood County that this Court should refuse the petition for Certiorari because all issues of fact have been correctly determined adversely to petitioners by the Courts below and all questions of law have been determined adversely to petitioners by former decisions of this Court.

Plaintiffs seem to assume in their petition for Certiorari that because this Court granted a Writ to the Circuit Court of Appeals (298 U.S. 651) to review the former proceedings there, such a Writ should again be granted. At that time an important procedural error was urged in the petition and it was proper for this Court to take jurisdiction

of the cause to correct this error, not only to insure that justice be done in this particular cause, but also to avoid the establishment of precedent for improper procedure.

Then too, the record on the facts at the time of the granting of the former Writ of Certiorari was unsatisfactory, the District Court having adopted findings favorable to the plaintiffs and the Circuit Court of Appeals having, to a large extent, either overruled these findings or disregarded them in holding that the Bill should have been dismissed.

There is also the important fact that since the time of the allowance of the former Writ of Certiorari there have issued from this Court important and far-reaching constitutional decisions setting at rest, or at least clarifying, many of the legal issues involved in this cause.

There is no inconsistency between the allowance of the Writ of Certiorari to the United States Circuit Court of Appeals for the District of Columbia in the cases of *Alabama Power Co. v. Ickes* (2 cases) and *Iowa City Light & Power Co. v. Ickes* (Nos. 84, 85 and 86, October Term, 1937) and the refusal of the Writ in this case. Those cases were decided solely on the right of plaintiffs to maintain their action and the Circuit Court of Appeals refused to pass upon the constitutional questions raised. In our case the Circuit Court of Appeals for the Fourth Circuit not only held that the plaintiffs had no standing to maintain their Bill, but went further and passed upon all the questions of constitutional infringement raised by the plaintiffs, assuming for the purposes of that portion of the opinion that plaintiffs did have a right to maintain their action.

I.

SUMMARY OF FACTS AS DETERMINED BELOW.

This Court has definitely announced the rule that it does not grant Certiorari to review evidence and discuss specific facts.

U. S. v. Johnston, 268 U.S. 220.

Sou. Power Co. v. N. C. Public Service Comm., 263 U.S. 508.

Harris v. Barber, 129 U.S. 367.

The District Court, along with its opinion of May 26, 1937, made certain findings of fact to be found in the Record at pages 779-790. The opinion of the Circuit Court of Appeals, after an examination of the Record, confirmed these findings of fact, not merely by a formal confirmation, but in respect to at least the most important of the findings, by independent references to the portions of the Record sustaining the facts as found by the District Court.

The rule is so well settled that where the findings of fact by a District Court are concurred in by the Circuit Court of Appeals they will not be reviewed by this Court and will be accepted unless clear error is shown, that we shall cite only a few of the more recent cases:

Page v. Arkansas Natural Gas Corp., 286 U.S. 269.
Texas & N. O. R. Co. v. Brotherhood of Ry. Clerks, 281 U.S. 548.
U. S. v. Commercial Credit Co., 286 U.S. 63.
Charleston Min. & Mfg. Co. v. U. S., 273 U.S. 220.
Bodkin v. Edwards, 225 U.S. 221.

In view of this rule, of the explicitness of the findings by the two lower Courts and of the abundant support for these findings in the Record, we think that the following summary of the contested factual elements in the case may now be regarded as the facts of the case.

Application for the loan and grant was made by Greenwood County to the Administrator of Public Works in November, 1933, without solicitation or suggestion from the Public Works Administration (R. 782, 853). The schedule of rates for the sale of electrical energy was prepared by agents of the County without consulting with the Public Works Administrator and that original schedule has never been changed (R. 782, 853).

After consideration of the application by the Administrator of Public Works an allotment was made, and after plaintiffs had been heard in opposition to the allotment, it was reaffirmed and a contract entered into between the Administrator and the County, by which the Administrator agreed to make a grant to the County and to purchase the County's revenue bonds so as to finance the construction of the proposed project (R. 782, 853).

The original contract was superseded by a contract dated Nov. 30, 1935, which new contract eliminated the provision in the old contract that the Government should be under no obligation to advance any money unless the County should have adopted a schedule of rates satisfactory to the Administrator, and specifically providing that neither the Administrator nor the Government should have any right or power with respect to rates to be charged for electrical energy by the County, except such rights as they might have as holders of revenue bonds under the laws of South Carolina (R. 782-83, 854-55). The contract of November 30, 1935, is the contract now in force and upon the basis of which the rights of the parties are to be determined.

Neither the United States nor the defendant Ickes has any power to control the operation of the project after construction is completed (R. 783, 854).

The power of approval or disapproval of a project rests entirely with the Administrator of Public Works and the President. The PWA State engineers, the Examining Divisions of the PWA, the Power Division and the Electric Power Board of Review, all of which were agencies established by the Public Works Administration for the purpose of aiding in the handling of applications and allotments, have had at all time only advisory powers with respect to approvals of applications (R. 783-84).

The Administrator in making this allotment to Greenwood County and in entering into the contract with the County, had no purpose other than that set out in the Act of Congress (R. 788, 857, 866). The policy of the Public Works Administration is correctly set out in the Administrator's report to the United States Senate (73rd Congress, 2nd. Session, Senate Document 167; Defendants' Exhibit 70):

> The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works thereby increasing the consumption of goods and also providing employment in the capital goods industry.

It was necessary for the Public Works Administration, in order to carry out Congress' mandate that any loan made should be reasonably secured, to examine the rates of private utilities operating in the territory in which the Greenwood County project would be developed. The proposed loan to Greenwood County was to be evidenced by revenue bonds so the Public Works Administration had to satisfy itself that the County's proposed rates were low enough to obtain customers and high enough to yield a revenue sufficient to pay off the bonds (R. 788, 857).

As of January 1, 1937, there were 9389 non-Federal projects of the Public Works Administration, the aggregate allocations therefor being $1,480,612,543.00. Of these only 282 are electric power projects and only 92 involve competition with existing private companies. Allocations for these 92 projects total $27,339,947.00, representing less than 2% of the total amount of allotments and less than 1% of the total number of allotments (R. 786, 856).

Title II of the National Industrial Recovery Act was enacted by Congress for the purpose of increasing employment. The means employed by Congress for this purpose—a program of public works financed in part by the National Government, and in part by the States and their sub-divisions aided by loans and grants from the National Government—in so far as they affect this case, are proper means of carrying out the national purpose of relieving unemployment (R. 787-88).

After the Administrator had, in pursuance of Senate Resolutions, made reports to Congress (Defendants' Exs. 70, 71, 72 and 73) showing the work being carried out by the Public Works Administration, including detailed lists containing names, allocations and types of each approved project and the funds allocated therefor, the Congress enacted the Emergency Appropriation Act, Fiscal Year of 1935 (48 Stat. 1021), the Emergency Relief Appropriation Act of 1935 (49 Stat. 115), the First Deficiency Appropriation Act, Fiscal Year 1936 (49 Stat. 1597), and the Public Works Administration Extension Act of 1937 (Sec. 201, Title II, Pub. Res. No. 47, 75th Congress), all of which Acts authorized the continuance of the Public Works Administration and performance of its functions

and made appropriations for the Public Works Program (R. 785-86, 863).

The determination to engage in the electric generation and distribution business was made by the authorities of Greenwood County of their own free will and any effect that the construction of the County's proposed plant will have on plaintiffs' rights or business will be the result of voluntary construction of the plant by the County and the voluntary decision of the County to use that plant in competition with the plaintiffs (R. 784, 866).

Greenwood County tentatively plans to sell about twelve million kilowatt hours to parties now customers of the plaintiffs. In 1936 plaintiffs sold in the Piedmont section of the Carolinas 2,476,000,000 KWH. From a practical standpoint it is inconceivable that this small competition will result in a forced reduction throughout the entire Duke System (R. 789-90, 858).

The County project could not serve as a yardstick for the fixing of private utility rates because of the difference in construction costs, difference in overhead and freedom from taxation (R. 789, 858, 866).

The project will be self-liquidating and any loan that the Government makes on the revenue bonds of Greenwood County will be reasonably secured (R. 787).

II.

DETERMINATIVE LEGAL AUTHORITIES.

If this Court takes the facts of the case as found by the two lower Courts and applies to those facts the principles of law announced in the decisions which we shall cite below, we think it will find that the case is determined.

A. Title II of the National Industrial Recovery Act does not violate the Constitution.

The enactment of Title II of the National Industrial Recovery Act is within the powers of Congress under the General Welfare Clause.

U. S. v. Butler, 297 U.S. 1.
Chas. C. Steward Mch. Wks. v. Davis, 81 L.Ed. 779.
Helvering v. Davis, 81 L.Ed. 804.

The enactment of Title II of the National Industrial Recovery Act is within the powers of Congress under the Commerce Clause.

U. S. v. Rio Grande Dam & Irrigation Co., 174 U.S. 690.
Arizona v. California, 283 U.S. 423.
Morgan v. U. S., 298 U.S. 468.

Title II of the National Industrial Recovery Act does not violate the 10th Amendment. The Courts below have found the record clear that no regulation of intrastate matters by the Federal Government is involved in the making of this loan and grant. Even were the collateral effect of the statute a regulation of intrastate activities, the statute would not be condemned as violative of the 10th Amendment.

Sonzinsky v. U. S., 81 L.Ed. 556.
Smith v. Kansas City Title Co., 255 U.S. 180.
Hampton & Co. v. U. S., 276 U.S. 394.
Arizona v. California, 283 U.S. 423.

Title II of the National Industrial Recovery Act does not violate the 10th Amendment because involving coercion of State sovereignty.

Chas. C. Steward Co. v. Davis, 81 L.Ed. 779.

There is in Title II of the National Industrial Recovery Act no unlawful delegation of legislative power to the Executive.

Cincinnati Soap Co. v. U. S., 81 L.Ed. 707, 714.
Hampton v. U. S., 276 U.S. 395.
Buttfield v. Strandham, 192 U.S. 470.

Even if it could be said that the original Recovery Act did not provide sufficiently definite standards for the Administrator's actions, Congress by subsequent enactments has adopted and ratified the acts of the Administrator.

Isbrandtsen-Moller Co. v. U. S., 81 L.Ed. 344.
Swayne & Hoyt, etc. v. U. S., 81 L.Ed. 400.

B. In making the loan and grant to Greenwood County the Administrator is not violating the statute.

The Administrator does not have, or seek to have, any control over rates to be charged by the County's project; that control remaining in the sovereignty of the State of South Carolina.

Park v. Greenwood County, 174 S.C. 35, 176 S.E. 870.
Duke Power Co. v. Bell, 156 S.C. 299, 152 S.E. 865.

As held by the Courts below the record shows that, contrary to plaintiffs' contention, the Administrator had no purpose or motive in making this loan and grant other than to relieve unemployment through the construction of useful public works. However, even if there were an ulterior motive on the part of the Administrator, his actions, if within his proper powers, are not invalidated thereby.

Isbrandtsen-Moller Co. v. U. S., 81 L.Ed. 344.
Dakota Tel. Co. v. S. Dakota, 250 U.S. 163.
Spalding v. Dickinson, 161 U.S. 483.
West v. Hitchcock, 205 U.S. 80.

C. Plaintiffs have no standing to attack the validity of the proposed loan and grant.

Greenwood County has the right under South Carolina law to build and operate the proposed plant; to sell its power; to receive a gift of money from the United States and to borrow money for the construction of the project.

XXXVIII Stat. of S. C. 411, 1392, 1543.
Park v. Greenwood County, 174 S.C. 35, 176 S.E. 870.

Plaintiff, having a non-exclusive franchise, cannot complain of competition by publicly-owned utilities.

Puget Sound Power & Lt. Co. v. City of Seattle, 291 U.S. 619.
Madera Water Works v. Madera, 228 U.S. 454.

Plaintiffs cannot attack the constitutionality of a statute or the act of an administrative officer as being in violation

of a statute unless they can show that they suffered a direct or special injury.

Massachusetts v. Mellon, 262 U.S. 447.
United Fuel Gas Co. v. R. R. Comm., 278 U.S. 300.

An act, although unauthorized, which infringes on right of a plaintiff, will not be enjoined merely because it will enable a third person to enter into competition with the plaintiff.

R. R. Co. v. Ellerman, 105 U.S. 166.
Chicago Junction Case, 264 U.S. 258.
Sprunt & Sons v. U. S., 281 U.S. 259.
Edward Hines Trustees v. U. S., 263 U.S. 143.

CONCLUSION.

There is presented here no lack of uniformity in decisions of Circuit Courts of Appeal, which is considered as perhaps the main reason for giving to the United States Supreme Court the power of granting Writs of Certiorari.

Magnum Imp. Co. v. Coty, 262 U.S. 159.
Forsyth v. Hammond, 166 U.S. 506.

On the contrary every Circuit Court of Appeals that has passed upon a case involving loans and grants of the Public Works Administration to State sub-divisions for the establishment of a competing utilities system, has held as did the Circuit Court of Appeals for the Fourth Circuit in the present case; the Eight Circuit so holding in the case of *Arkansas-Missouri Power Co. v. Kennett*, 78 F.(2d) 911; the Tenth Circuit in the case of *Kansas Gas & Elect. Co. v. City of Independence*, 79 F.(2d) 638, and the Circuit Court of Appeals for the District of Columbia in the case of *Alabama Power Co. v. Ickes*, ___ F.(2d) ___.

In conclusion we submit that the facts as established by the holdings of the two Courts below and the law as

established by former decisions of this Court, completely justify a denial by this Court of the Petition for Certiorari.

Respectfully submitted,

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Attorneys for Greenwood County and its Finance Board.

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY, PETITIONERS

v.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW AND E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR RESPONDENT HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS

The respondent Administrator does not oppose the granting of a writ of certiorari in this case.

The court below held, affirming the decree of the District Court, and reaffirming the conclusions reached on the former appeal, 81 F. (2d) 986 (reversed on procedural grounds, 299 U. S. 259), (a) that the petitioners have no standing to

question the validity of the proposed loan and grant to the respondent county and (b) that the statute under which the loan and grant are proposed to be made is constitutional and the action of the Administrator is authorized by the statute. The same result has been reached by the Circuit Court of Appeals for the Tenth Circuit on the second ground, without consideration of the first, *Kansas Gas & Electric Co.* v. *City of Independence,* 79 F. (2d) 32. The same result has also been reached on the first ground, without consideration of the second, by the Circuit Court of Appeals for the Eighth Circuit in *Arkansas-Missouri Power Co.* v. *City of Kennett,* 78 F. (2d) 911, and by the Court of Appeals for the District of Columbia in *Alabama Power Co.* v. *Ickes,* pending on writs of certiorari granted June 1, 1937, Nos. 84, 85, and 86, present term.

Because of the pendency of the *Alabama Power Co.* cases, *supra,* the Court may wish to consider the instant case at the same time.

Respectfully submitted.

STANLEY REED,
Solicitor General.

SEPTEMBER 1937.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY and SOUTHERN PUBLIC UTILITIES COMPANY, PETITIONERS,

versus

GREENWOOD COUNTY and E. L. BROOKS, S. A. AGNEW and E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, and HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, RESPONDENTS.

BRIEF FOR RESPONDENTS, GREENWOOD COUNTY AND ITS FINANCE BOARD

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY and SOUTHERN PUBLIC UTILITIES COMPANY, PETITIONERS,

versus

GREENWOOD COUNTY and E. L. BROOKS, S. A. AGNEW and E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, and HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS, RESPONDENTS.

BRIEF FOR RESPONDENTS, GREENWOOD COUNTY AND ITS FINANCE BOARD

OPINIONS OF THE COURTS BELOW

The opinions of the Courts below which have been officially reported are as follows:

Opinion of the District Court on motion to dismiss, 10 Fed. Supp., 854 (R. 117, April 23, 1935).

Opinion of the District Court on the merits, 12 Fed. Supp., 70 (R. 477, August 10, 1935).

Order of Circuit Court of Appeals remanding cause to District Court, 79 Fed. (2d), 995 (R. 515, Dec. 5, 1935).

Opinion of Circuit Court of Appeals on the merits, 81 Fed. (2d), 986 (Feb. 22, 1936).

Order of this Court remanding the cause, without opinion on the merits, 81 L. Ed., 149 (R. 539, Dec. 14, 1936).

Opinion of the District Court upon rehearing of the cause, 19 Fed. Supp., 932 (R. 744, May 26, 1937).

Opinion of the Circuit Court of Appeals, 91 F. (2d), 665 (R. 848, August 6, 1937).

STATEMENT OF CASE

This bill in equity was instituted in the District Court of the United States for the Western District of South Carolina on November 7, 1934, against Greenwood County and the members of its finance board (R. 2). Harold L. Ickes, as Federal Emergency Administrator of Public Works intervened and was made a party defendant on December 4, 1934 (R. 65).

The defendants' motion to dismiss the bill was overruled by the District Court (R. 117) and the matter was referred to a Special Master to take testimony (R. 152). The Court, after the testimony taken had been reported to it (R. 157), granted the injunction prayed for (R. 484). From this order the defendants appealed to the United States Circuit Court of Appeals for the Fourth Circuit, but because of the fact that during the pendency of the appeal the Administrator and the County had entered into a superseding Loan and Grant Agreement, the Circuit Court of Appeals, upon motion of the Administrator, remanded the cause to the District Court (R. 515).

The District Court, after admitting additional testimony, refused by its order dated December 21, 1935, to vacate the injunction order (R. 518-527). Upon appeal by

the defendants, the Circuit Court of Appeals reversed the injunction orders of the District Court and ordered the bill dismissed (81 Fed. (2d), 986).

Certiorari was granted by this Court on the petition of Duke Power Company (298 U. S., 651), but, after a hearing had been had, this Court, without expressing an opinion on the merits, reversed the order of the Circuit Court of Appeals and remanded the cause to the District Court with directions to vacate the injunction orders of August 26, 1935, and of December 21, 1935, and to retry the case (R. 540, 81 L. Ed., 149).

The District Court, after vacating the injunction orders (R. 541) and granting a temporary restraining order (R. 550), heard the case on its merits, and by its final decree (R. 799) denied the relief prayed for by petitioners and dismissed the petitioners' bill on the merits, filing its opinion (R. 744) and findings of fact and conclusions of law (R. 779).

From the decree of the District Court the petitioners appealed to the Circuit Court of Appeals. A cross appeal was prosecuted by the defendants from that portion of the decree directing that one-half of the costs be taxed against the defendants.

The Circuit Court of Appeals, by its decree dated August 6, 1937 (R. 878) affirmed the decree of the District Court except in so far as it taxed one-half of the costs against the defendants, and as to this the District Court's decree was reversed.

The petition for certiorari was granted by this Court October 25, 1937.

DISCUSSION OF FACTS

Petitioners' case has always seemed to us to rest necessarily upon the correctness of their assumption that the evidence completely establishes certain ultimate conclusions of fact favorable to them. Their arguments on the fundamental legal questions involved all lead from one or more of these assumed factual conclusions, are all based wholly upon these conclusions and are all unavailing if these conclusions are incorrect. We submit that the Record, especially in view of the two opinions below, clearly shows these assumptions of fact to be erroneous and the further use by petitioners of such disproved conclusions as premises in the various portions of their argument to be unwarranted.

The District Court has made complete Findings of Fact covering all of the factual matters at issue between the parties in this litigation and as to which evidence was adduced. We could not in any attempted summary hope to produce a more concise or coherent picture of the factual background than that continued in the District Court's Findings as they appear on pages 779-790 of the record.

The Circuit Court of Appeals, after examining all the testimony and exhibits in the light of petitioners' assignments of error accepted these findings as correct and in confirming them made independent references, at least in connection with the more important, to those portions of the Record which established them. This concurrence of the two lower Courts on the questions of fact raised concludes those questions since this Court has definitely announced the rule that if does not grant certiorari to review evidence and discuss specific facts. *U. S. v. Johnston,* 268 U. S., 220; *Southern Power Company v. North Carolina Public Service Commission,* 263 U. S., 508.

The rule is so well settled that where the findings of fact by a District Court are concurred in by the Circuit

Court of Appeals they will not be reviewed by this Court and will be accepted unless clear error is shown that we cite only a few of the more recent cases:

Page v. Arkansas Natural Gas Corp., 286 U. S., 269.

Texas & N. O. R. Co. v. Brotherhood of Ry. Clerks, 281 U. S., 548.

U. S. v. Commercial Credit Co., 286 U. S., 63.

In view of this rule, of the explicitness of the findings by the two lower Courts and of the abundant support for these findings in the Record, we think we are clearly justified in taking the position that the Findings of Fact by the District Court, at least insofar as they are specifically concurred in by the Circuit Court of Appeals, may now be regarded as the facts of the case. However, since petitioners have sought so consistently throughout the litigation to establish certain allegations as facts and have based their case so completely on the assumption that they are facts, it is advisable for us to separately consider the more significant of these findings to show how fully they are established by the record.

Purpose of the Administrator

Petitioners' contention, which has assumed more and more importance as the litigation has proceeded and other positions have been weakened, is that the Administrator made this loan and grant for the purpose of reducing petitioners' rates, so doing because of an established policy on his part to use PWA money to reduce power rates throughout the country. There is no evidence whatever establishing the immediate purpose attributed by petitioners to Mr. Ickes and the testimony as to his general policy falls far short of proving even the existence of such a policy. The two Courts below have held that just the contrary has been proved and have found as a fact (R.

788, 856) that the Administrator in making the loan and grant to Greenwood County had no purpose of lowering petitioners' rates; his policy and that of the Public Works Administration being correctly set out in the Administrator's Report to the U. S. Senate (73rd Congress, second session, Senate document 167; defendants' Exhibit 70):

> The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works, thereby increasing the consumption of goods and also providing employment in the capital goods industry.

The finding as to the general policy of the Public Works Administration is justified by evidence throughout the record. Mr. Ickes testified on the stand in Spartanburg that he had no intention of exercising any control or influence over the rates to be charged by Greenwood County (R. 642); that he had no interest in the rates of the county's competitors save as an investor in revenue bonds of the county (R. 643); that the statement contained in defendants' Exhibit 70, Senate Document 169, is a correct statement of the policy of the Public Works Administration (R. 645); that in connection with the application of Greenwood County he took into account no considerations other than those general ones to which he had referred (R. 646); that neither he nor the Public Works Administration had any intention of engaging in the operation, directly or indirectly, of the Greenwood County project (R. 651); and that he would have made the loan and grant to Greenwood County regardless of the rates of the Duke Power Company, or his opinion of the rates, if Greenwood County had legal authority to enter into the contract and could satisfy the Public Works Administration that it could liquidate the loan (R. 667).

No purpose on the part of any representative of the Public Works Administration other than that declared in

the Act was disclosed or evidenced to any of the representatives of Greenwood County. Mr. Emmett I. Davis, secretary of the Greenwood Finance Board, testified (R. 688): "I know of no instance either in correspondence or in interviews where the Public Works Administration, or any of its employees or agents, have said or indicated that the direct or implied object of this loan and grant was or is for the purpose of forcing down Duke Power Company rates." To the same effect is his testimony on page 689 of the record; the testimony of Mr. Barksdale (R. 668); of Mr. Duncan (R. 696), and of Mr. Sweeney (R. 698).

Examination by PWA of Duke's Rates

The fact that the Public Works Administration examined Duke's rates before approving the application of Greenwood County does not mean that they had any design to force down those rates. As to this the District Court made a separate finding (Finding XIX, R. 788) approved by the Circuit Court (R. 856) pointing out that, since the bonds offered by Greenwood County for the loan were revenue bonds depending for their security upon revenues of the project, the Public Works Administration had to satisfy itself that the county could meet the rates of the private utility operating in the territory and thus be assured of the reasonable security required by Congress under Title II of the National Industrial Recovery Act, Section 203 (a), (Appendix to Government's Brief, p. 4).

On the original hearing Mr. A. C. Bruce, of the Federal Power Commission, pointed out the necessity of examining the Duke Power Company's rates (R. 294); as did also Mr. C. E. Rose (R. 300, 307).

Mr. Ickes stated under oath that his interest was that of any bond holder, saying (R. 643):

> I have no interest in the rates of the County's competitors because of our investment in the County's

> plant. The fact that the rates of the plaintiffs were high or low might indirectly affect the security of the County's bonds. If the plaintiffs reduced their rates below the cost of producing and supplying current and the County had to meet these rates in order to hold its customers, it would have indirectly an effect. Other than that which I have just indicated, neither I nor the United States Government has any interest in the plaintiffs' rates.

Mr. Ickes states (R. 667), that he would have made the loan and grant to Greenwood County regardless of the petitioners' rates if he were otherwise satisfied of the legality and security of the loan. On cross examination he repeated, with perhaps even more emphasis, that his only interest in the rates of either the County or the petitioners was the interest of a prospective bond holder (R. 665).

Dr. Clark Foreman, the head of the Power Division of the Public Works Administration, thus states (R. 671) the consideration that is given to rates when revenue bonds are offered:

> If the project is a competitive project, that is to say, if it would be competitive with the existing private utility were it built, then we would have to assure ourselves that the rates of the project would be sufficiently low to secure business and sufficiently high to pay out the bonds which we would lend on. • • • We do not give consideration to the rates of the proposed municipal plant or of the existing private utility for any other purpose than that of reasonable security.

Mr. D. T. Duncan, County Engineer, who designed the rate schedule, was moved by the same consideration. He states in his testimony that he realized the County had to have rates under which they could sell power, and that they must undersell the steam plants operating in the territory and the Duke Power Company in order to get customers (R. 695).

Petitioners' Evidence as to Purpose of Administrator

In contradiction of these definite and authoritative statements as to the true policy of the Public Works Administration petitioners have only offered certain PWA press releases, excerpts from Mr. Ickes' book, "Back to Work," remarks made on cross examination at the original hearing by an engineering witness, C. E. Rose, and the testimony of the witnesses Vennard, Byerley, Carter and Post at the last hearing before the District Court. The excerpts from the press releases and from the Administrator's book lose the meaning attributed to them by petitioners when replaced in their original context and the manner and purpose of their publication is considered. The remarks of the witness Rose, a PWA subordinate qualified to speak only as to engineering matters, are equally unreliable as evidence of the real policy of the Administrator. All of these—press releases, book and testimony of subordinate—were covered by Mr. Ickes when he was on the stand and he flatly contradicted the implications drawn by petitioners from them (R. 648-51, 666-70).

There remains to be considered then, in this connection, only the effect of the evidence offered by plaintiffs at the final hearing before the District Court. The testimony of the witnesses Post (R. 577), Vennard (R. 590), Byerley (R. 606), and Carter (R. 610) and Plaintiffs' Exhibits 50 to 74 (R. 595-602, 608, 611-14, 619-26, 702) were offered for the sole purpose of establishing the existence of a "power policy" in the Public Works Administration—a policy to procure, in addition to the results anticipated by the statute, a reduction in private utility rates. All of this evidence concerned activities of members of the Electric Power Board of Review, a board which at one time existed in the Public Works Administration for the purpose of reviewing applications for the financing of electric power plants and of making recommendations in connection with

such applications to the Administrator. The individual members of the Electric Power Board of Review, according to petitioners' argument, went beyond this advisory capacity and in handling applications used their power for the purpose of causing private utilities to lower their rates, thus evidencing the existence of a fixed purpose on the part of the Public Works Administration to reduce utility rates.

We shall argue below that the testimony adduced for this purpose should not have been admitted in evidence; but we say also that, even if it be considered competent, it is entitled to little weight as against the clear statements by the Administrator to Congress and to the Court as to his purposes and policy. The substance of this testimony can be stated as follows: When a utility learned that a municipality at the time being served by it had applied to the Public Works Administration for a loan or grant with which to erect its own generating or distribution system, the Public Relations Counsel of that utility went to Washington and conferred there with a member of the Electric Power Board of Review, either Mr. Henry T. Hunt or Mr. Otto Rau, in regard to the city's application; sometimes filing a formal protest, sometimes handling the matter informally. In the discussion the question of utility rates came up; whether raised by the utility representative or by the Public Works representative is not clear from the testimony. In some cases the utility proposed that they would reduce their rates and the municipality would withdraw its application. When such a proposal was made it was usually referred, as the exhibits will show, to the municipality, and at times it was suggested to the municipality that it consider the question of withdrawing its application.

Negotiations of this character were testified to in regard to numerous municipal applications, but in no instance did the petitioners offer testimony as to what was the

eventual outcome of the applications. After this testimony was in, Dr. Clark Foreman, the head of the Power Division, which is the board now charged with duties similar to those of the old Electric Power Board of Review, attempted, over petitioners' objection, to state the final disposition of the applications referred to in petitioners' testimony. In all cases which it was possible to trace to a conclusion it developed that the question of lowering utility rates was not the determining factor in granting or refusing the loan, except insofar as the rates affected the security (R. 673-76). Regardless, therefore, of what discussions took place between Mr. Hunt and Mr. Rau and the representatives of the utility companies, none of these discussions had any effect in determining whether the allotment would be granted or not.

Although some of these applications had to do with general obligation bonds rather than revenue bonds, the Public Works Administration would even in those cases have some legitimate interest in prevailing rates. The 1930 census figures, of which this Court will take judicial notice, show that the municipalities whose applications were referred to by petitioners' witnesses were almost all very small in population and there was the likelihood to be considered that the revenue from the proposed plant would be the only source from which the municipality could obtain funds to pay the debt. Under a situation of this sort a cautious investor would have a very real interest in assuring himself before purchasing general revenue bonds of a small municipality that the power plant to be constructed with the proceeds of the bonds could meet local competition so as to be operated at a profit and actually provide the municipality with sufficient funds to retire its bond issue.

Another equally important reason for the ineffectiveness of this line of testimony is that it is wholly concerned with the activities of one small board and the actual au-

thority of that board was definitely and indisputably limited in scope.* The board was created by an order of the Administrator dated May 9, 1934 (Plaintiffs' Exhibit 46, R. 574). This order gave to the Electric Power Board of Review only the right to recommend; it reserved to Mr. Ickes the sole power of making allotments. When it came to the Administrator's attention that the board was exceeding this authority, he wrote a memorandum to Mr. Hunt (Defendants' Exhibit 79, R. 714), admonishing the board to confine its powers "to what I originally intended them to be, namely, the review of power projects and the making of reports and recommendations to me for my decision." The board was dissolved by an order of the Administrator, March 16, 1935 (Defendants' Exhibit 78, R. 713).

Parenthetically, it occurs to us that regardless of the purpose of the members of the board in carrying on negotiations with power companies as to their rates, the effect of what they did was to provide the Public Works Administration with information extremely valuable in its legitimate determination of whether there existed in each application the reasonable security demanded by the Statute. The result of the negotiations was a definite ascertainment of the extent to which the existing utility was willing to reduce its rates. Having before it the lowest possible figure at which the private utility was willing to operate, the Public Works Administration not only knew that if the proposed municipal project could approximate those rates when constructed it could sell power and be self-liquidating, but was also assured that after construction the municipal plant would not be subjected to ruinous competition.

Furthermore, this whole line of testimony has no material effect in this case because there is no evidence at

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* In fact, as we shall point out below in discussing the admissibility of the evidence, the petitioners' testimony does not even purport to show any illegal *action* by the Electric Power Board of Review *as a board*. It refers only to statements and representations made by the individuals who composed the Board.

all that the Electric Power Board of Review or anyone else connected with the Public Works Administration negotiated with petitioners as to their rates or made any effort at all to force down their rates. Had there been any correspondence between the Public Works Administration and Duke Power Company suggesting that the Power Company reduce its rates, or conversations to that effect, certainly the petitioners would have offered the correspondence or testimony as to the conversations in Court.

As a matter of fact, if an examination is made of the testimony introduced by the Duke Power Company in July, 1934, before the Board of Review in protesting on the Greenwood County application (Defendants' Exhibit 57), it will clearly be seen that no such discussion had been had with the Duke Power Company. This exhibit, which is being sent up with the Record, is a very interesting commentary on the liberality of the Public Works Administration in permitting a protestant to go into all forms of protest which it desired. It will be seen that the board permitted counsel for Duke Power Company to introduce evidence relating to the charities of the Duke Endowment because the Duke Endowment happened to own stock in the Duke Power Company, something that was far afield in the matter under discussion. It permitted Duke Power Company to produce engineering testimony in which they attempted to persuade the Public Works Administration that the project was not financially sound. It permitted Duke Power Company to offer testimony of textile executives protesting against the Greenwood plant upon the ground that it might permit lower power rates to certain textile mills in Greenwood County which were not served by the Duke Power Company.

Finally, it is our position that even if this testimony does tend to show the existence of a purpose on the part of the Electric Power Board of Review to reduce private utility

rates and this purpose be attributable to the Administrator, still at the time of the execution of the present contract between the Public Works Administration and Greenwood County on November 30, 1935, the Electric Power Board of Review had been dissolved for ten months, its actions repudiated by the Administrator and its policies abandoned. At that time the Power Division had been established and its policy in making recommendations is clearly set out in the testimony of Dr. Clark Foreman, its director (R. 670-72). Dr. Foreman stated that no consideration is given to the rates of a proposed municipal plant or of the existing private utility "for any purpose other than that of reasonable security." He stated that since he has been director of the power division he frequently discussed matters of policy with the Administrator and that there has been no change in policy since his appointment (R. 673).

The holding is implicit in both opinions below that the fact that an extraneous power policy once existed and motivated the actions of some of the boards or departments of the Public Works Administration cannot affect our case if that policy had been abandoned. The Courts below in interpreting the testimony as to the policy of the Public Works Administration from the time of its inception to the present adopted the view that at one time an emphasis had been placed upon the social desirability of lowering power rates but that such policy was abandoned. We do not agree with the lower Courts in this interpretation of the evidence, but we do rely upon their conclusion that, even accepting as a fact the existence at one time in the handling of applications by the Public Works Administration of a policy apart from the purposes of Title II and the purposes announced by the Administrator in his Report to the Senate, the existence of that erstwhile policy does not affect the policy now existing or invalidate acts done under that proper

policy. The petitioners have no vested right in an administrative error.

County's Control of Plant and Rates

It seems to us that any purpose to force down petitioners' rates by subsidizing competition with petitioners by the County would on its face be futile unless the Administrator had the power to control the rates of the County. Both Courts below have found that no such right to control the rates exists (R. 783, 854). Paragraphs 12 and 13 of the contract of November 30, 1935 (R. 501), could not more definitely evidence the intention of the parties that after the plant is constructed all matters of operation, including the right to fix rates, will be under the control of the County. The only rights which the contract gives the Administrator as to rates for service are those rights which a holder of revenue bonds would have regardless of contract under the Constitution and laws of South Carolina.

It might be well at this point to discuss briefly the changes made in the contract of December 8, 1934, by the contract of November 30, 1935, and the reasons for those changes. The 1934 contract contained a provision requiring the borrower to have adopted a resolution as to rates satisfactory to the Administrator before the Government should be under any obligation to make the loan. This provision was intended by the parties to the contract to apply only to the initial rates (R. 650) and we believe by its terms had only such application. However, this provision was construed by the District Court on the original motion to dismiss (R. 122, 480) as giving to the Administrator continuing control over the rates. Thus construed the provision violated the South Carolina Revenue Bond Act (Appendix to Government's Brief, p. 56), which required the municipality to reserve the right to alter the rates in order to properly service the bonded debt. Because of the respect which respondents had for the District Court's construction

of this provision, a new contract was drawn with a view to clarifying the language so that by no possible interpretation could it be said to violate the State Act.

It was also thought advisable to change the contract in another respect. The contract of December 8, 1934, contained certain provisions as to labor which were construed in the case of *Arkansas-Missouri Power Company v. City of Kennett, Mo.*, 78 F. (2d), 911, as giving to the Administrator the right to impose new labor conditions after construction had been started. The Court of Appeals in the *Kennett case* held that this constituted an illegal delegation of the municipality's right to control municipal construction. This point was never raised in our case, but, when the opinion in the *Kennett case* was called to Mr. Ickes' attention, he decided to submit new contracts to the various municipalities eliminating these labor provisions as well as the provisions found by the District Court in our case to be objectionable to State law (R. 643-45).

Petitioners' brief makes the point that since Greenwood County's rates, which were adopted prior to the change of the contract (November 30, 1935), were readopted by the County after the new contract, there is no substantial difference between the two contracts, and the further point that the date of the original allotment, July, 1934, is the determining date on the question of legality of the project. Petitioners' counsel, however, fail to point out that the rates proposed for the Greenwood County project were designed by the County's engineers prior to the time the application was made to PWA, and have never been changed since that time. This fact was thoroughly established by the District Judge's sixth Finding of Fact (R. 781-782), to which no error was assigned when the petitioners appealed to the Circuit Court of Appeals. It is clear, therefore, that Greenwood's rates were not a result of any conference between the Administrator and the County.

PWA Funds Used for Power Projects Insignificant

Another fact which disproves the existence of any effort by the Administrator to use the funds appropriated to the Public Works Administration to carry out a policy of reducing private utility rates is that only a very small proportion of the funds available to him for the construction of public works has been used to promote competitive power projects. Both of the lower Courts were impressed by the unimportance of this field of PWA activity in comparison with the work done by it in other fields (R. 786, 856). They both stressed the fact that as of January 1, 1937, there were 9,389 non-Federal projects of the Public Works Administration of which only 282 were power projects and only 92 of these 282 involved competition with existing private companies. The total amount involved in these 92 so-called competitive projects was only $27,339,947 as compared with $1,480,612,543 involved in the 9,389 non-Federal projects. This is less than 1% of th total number of allotments and .98% of the total amount of allotments. The Courts below quite logically adopted the view that it does not seem reasonable to say that Mr. Ickes acted as Administrator with the primary purpose of causing competition to private utilities and yet used so sparingly his broad powers and the vast funds available to him to carry out that purpose.

No Solicitation of Application by PWA

The factual position taken in petitioners' argument that the Public Works Administration solicited or instigated Greenwood County's application for the loan and grant so that competition would be given the petitioners and their rates forced down is without support in the record, the evidence being definitely to the contrary and amply supporting the concurrent findings by the two lower Courts (R. 784, 853) that the determination to engage in the genera-

tion and distribution of electric power was made by the properly constituted authorities of Greenwood County of their own free will and that there was no solicitation nor coercion on the part of the Public Works Administration or any of its representatives.

Plaintiffs' Exhibit 38 (R. 368-370) shows that the Special Board for Public Works approved Greenwood County's application and made an allotment on June 20, 1934; that it was approved by the President on June 27, 1934, and that after reconsideration had been given to the allotment by reason of the protest of the Duke Power Company (defendants' Exhibit 50, R. 463, defendants' Exhibit 57), the allotment was reaffirmed by the Board and the President on November 7th and 8th, 1934 (R. 368-69), and was included in a list signed by the President on the latter date (R. 370).

The uncontradicted testimony of Mr. D. T. Duncan, Chief Engineer for the County (R. 267-274), shows that the rates for the proposed Greenwood County project were designed by him upon his own calculations of the costs, financing and possible market for the project. These rates set up prior to the application of the County to the Public Works Administration are the same rates which the County now expects to charge. They were fixed by resolution of the County Board passed pursuant to the South Carolina Revenue Bond Act (R. 20-33). They were reaffirmed in the rate resolution of December 2, 1935 (defendants' Exhibit 73), adopted immediately after the executing of the existing loan and grant agreement of November 30, 1935.

Mr. Davis states (R. 687):

> Neither the Public Works Administration of the Federal Government or any other branch or representative of the Federal Government, so far as I know, solicited or suggested the filing of this application. Greenwood County has taken the initiative in filing the application, pressing the Public Works Administra-

tion for an allotment and in litigation involving the case.

He further states (R. 689):

> I have not received at any time from anyone connected with the Public Works Administration a suggestion that Greenwood County withdraw its application in exchange for a lowering of rates in territory served by the Duke Power Company.

Mr. Duncan said this (R. 693):

> The original rates fixed in the application were fixed by me and by my engineering staff without any advice or suggestions from anyone connected with the Public Works Administration. In going over these matters again at the request of the Finance Board my engineering staff has acted independently of the Public Works Administration and recommended these figures to the Board without consultation with the Public Works Administration engineering staff. • • • No one connected with the Public Works Administration or any other branch of the Federal Government solicited this application from me, or, as far as I know, from any member of the Board. Greenwood County filed the application and has pressed it with the Public Works Administration as vigorously as possible. • • • At all times the County has been the body pressing for this allotment. It has not been solicited in any fashion, as far as I know, by the Public Works Administration.

Secretary Ickes states unequivocally (R. 646):

> In no instance did I solicit specific applications. The applications came voluntarily from the community that wanted the public works projects, accompanied by engineering and legal data. Sometimes it was incomplete and we had to send it back for additional information, but it was always initiated by the local community.

Specifically as to the Greenwood County application the Administrator said (R. 646):

> Neither I, nor the Public Works Administration, nor the United States Government, initiated or insti-

gated or induced the making of applications for competitive power projects. We did not in the particular case of Greenwood County.

The period of time elapsing between the filing of the County's application and the approval of the project in itself sufficiently refutes the idea that the Administrator had urged or was hastening the construction of a plant to compete with the petitioners. The application was made on November 16, 1933, and was not approved until eight months thereafter, on July 19, 1934 (R. 267, 368, 370, 695). Because of protests by the Duke Power Company which the Public Works Administration scrupulously gave ear to (R. 181, 363), no contract was entered into until December 8, 1934 (R. 513, 521), a period of another six months. During all this time Greenwood County was the party that was pressing for action (R. 687).

As denying the existence of petitioners' contended for "power policy" in the Public Works Administration, these simple facts stand on a par with the previously discussed showing of how comparatively little of the appropriations for public works went to competitive power projects.

County's Rates No Yardstick

All of the facts discussed above, of course, go to refute petitioners' broad position that the Administrator in making the loan and grant was acting in furtherance of his policy to bring about a reduction of private utility rates. Petitioners, however, make the further contention that regardless of the existence or non-existence of this policy the *effect* of this loan and grant will be to set up a yardstick for the fixing of private utility rates and for this reason alone must be considered illegal. We shall have more to say as to the legal aspects of this argument below, but it is enough to point out at this time that the District Court found as a fact that the rates charged by the Greenwood County project could not be used as a yardstick for rates

charged by electrical utilities in South Carolina. There is, the Court said (Finding XX, R. 789), no logical comparison possible between the factors necessarily used by the two plants in rate computation. The District Court's finding as to this is clearly sound and was held by the Circuit Court to be amply supported by the testimony (R. 858). The Greenwood County plant would clearly have two competitive advantages: (1) the fact that a portion of its construction cost came as a grant from the Federal Government and (2) at least partial exemption from taxation. The private utility on the other hand would also have two advantages: (1) the fact that in a large system the overhead cost per K.W.H. would be substantially less than in the small municipal plant and (2) freedom from the labor and material provisions in the PWA contract and resulting reduction in construction cost.

Petitioners' witnesses agree that there would be no usable yardstick, Mr. Reed stating (R. 565) that a comparison of the rates of the Greenwood County project with the rates of Duke Power Company would be fallacious; as does also Mr. Marshall (R. 179, 184).

Damage to Petitioners

Another Finding of Fact by the District Court that we should like to comment upon briefly is that concerned with the alleged necessity that petitioners reduce their rates throughout their entire system to meet the competition in Greenwood County. That finding (XXI, R. 789) is another of those specifically approved by the Circuit Court of Appeals (R. 858) and is as follows:

> The testimony shows that at the most the Greenwood County plant will produce about 25,000,000 K.W.H. Of this amount the County has tentative plans to sell about 12,000,000 K.W.H. to parties who are now customers of Duke Power Company. Duke Power Company, in the Piedmont Section of the Carolinas in 1936

sold 2,476,000,000 K.W.H. The increase over their 1935 sales was over 380,000,000 K.W.H. Thus the loss of 12,000,000 K.W.H. to Greenwood County will amount to only about 3% of the annual increase of the Duke Power Company. From a practical standpoint, it is inconceivable that this small competition would result, under all of the evidence in this case, in a forced reduction throughout the entire Duke system.

In any event, the Duke Company in appearing before the South Carolina regulatory body with respect to its rates could show these pertinent facts in a very definite manner. We do not conclude that the competition of the Greenwood County plant would necessarily force the Duke Company to lower its rates throughout the system.

The evidence substantiates the finding that the loss by Duke Power Company to the Greenwood County project will not result in a general reduction of Duke Power Company's rates. Plaintiffs' Exhibit 18 (R. 340) lists the customers of the Duke Power Company with whom Greenwood County has made contracts and shows that Greenwood County will sell to such present customers of Duke only about 12,000,000 K.W.H. annually. It is not the County's intention to confine its sales of electricity to customers of the petitioners, Mr. Davis saying (R. 687):

> Greenwood County has not heretofore and does not intend to confine its efforts to selling power to Duke Power Company customers alone. Greenwood County hopes to sell the major part of its primary current output to municipalities, rural sections and small industries in Greenwood, Newberry and Laurens Counties and surplus primary and secondary to large industrial users. The undeveloped rural load in the three counties plus the developed industrial load in Greenwood County, not now sold by Duke Power Company, is sufficient to liquidate loan at proposed rates.

Mr. Duncan's testimony is to the same effect (R. 694).

Mr. Davis states (R. 690) that Greenwood County will not have generating capacity sufficient to take on many

more large industrial customers and that it will be only a comparatively short time before the municipal and rural areas will begin to absorb the entire output of the plant. He testifies that since the preparation of plaintiffs' Exhibit 18, the County had obtained some prospective contracts with one of Mr. Abney's mills, which is not now served by Duke.

The field of customers unsold by Duke Power Company is ample for the Greenwood project to sell all of its power. Mr. Davis states (R. 313-314) that Duke furnishes only 8% to 10% of the power used in Greenwood County.

In 1934 a cotton mill owner at Clinton, S. C., built a steam plant and began to furnish power to former customers of Duke (R. 313; defendants' Exhibit 45, R. 430). The loss of these customers, the City of Clinton, Clinton Cotton Mills, Lydia Cotton Mills and Panola Cotton Mills, is admitted by petitioners' witnesses, Marshall (R. 181), and Reed (R. 563). The amount lost to these customers was about the same amount of business as the Greenwood County project will take from Duke (Reed's testimony, R. 563). Despite these losses, Duke Power Company is continuing to do business and has not had to reduce its rates (R. 564).

Duke's sales in 1936 were the highest in the history of the system (Reed, R. 563; Nabow, R. 629; defendants' Exhibits 90 and 91, R. 734), being an increase over 1935 sales of approximately 380,000,000 K.W.H., or sixteen times Greenwood County's maximum annual production of 25,000,000 K.W.H. (R. 565).

In the opinion of the County's witnesses, Chapman, Duncan, and Sweeney, the construction of the Buzzard Roost project and the sale by Greenwood County of all its available power will not materially affect the Duke Power Company system (R. 668, 696, 698).

This opinion is substantiated by petitioners' witness Reed, who admitted that the proposed Buzzard Roost plant,

because of its small size, could not materially damage the Duke Power Company in dollars and cents (R. 565).

We have not in this rather disjointed treatment of the facts as established by the Courts below gone into all of the factual elements of the case, but have confined ourselves to the Findings most strongly contested by petitioners and which they must overcome before they can hope to succeed in this appeal. We believe that we have demonstrated from the Record how inevitable those findings are.

SUMMARY OF ARGUMENT

Since Greenwood County has full constitutional and statutory authority to operate its plant in competition with the Duke Power Company, the latter has no standing in Court to investigate the source from which the County obtains the funds to build the plant, and therefore the legality of the Administrator's action in making the loan and grant does not present a justiciable controversy in this Court.

The Congress of the United States, under the provisions of the General Welfare Clause, had a right to allocate funds to the several States, and their subdivisions, to be used by them in a comprehensive program of public works in order to relieve national unemployment.

Title II of the Recovery Act in delegating to the President the powers to select individual projects to be included in the comprehensive program under the standards and classifications set out in the Act did not violate the constitutional prohibition against the exercise of legislative power by the executive.

The Congress having directed the President, through the Administrator of Public Works, to include in the comprehensive program projects for the development of water power and for the transmission of electrical energy, the Administrator and the President complied with the Act when they allocated funds to Greenwood County for the

construction of a hydro-electric plant on the Saluda River and for transmission lines to convey this electrical energy.

Any incidental non-national effect which the Recovery Act may have or which this particular project may have, does not render the allocation of these funds illegal.

ARGUMENT

I

Petitioners have no Standing to Attack the Validity of the Loan and Grant Agreement

Both of the courts below, apart from their decisions in favor of defendants on the constitutional questions involved, held that the determination of those questions was not necessary, petitioners having no standing in court to question the expenditure of federal funds, either upon the ground that Title II of the National Industrial Recovery Act is unconstitutional or upon the ground that the statute has not been complied with. This holding is in accord with that of every appellate court to which the question has been presented.*

It is elementary that before a party is entitled to ask for any relief under our system of jurisprudence he must show that he has a legal right that has been invaded or is threatened with invasion by the acts of which he complains. This Court has had occasion during the present term to reaffirm this rule. In *Ex Parte Albert Levitt*, 82 L. Ed. 1, the *per curiam* order contains the following language:

> It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a *direct injury* as the result of

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* The decisions of other Circuit Courts of Appeal are: *Alabama Power Co. v. Ickes* (App. D. C.), 91 Fed. (2d), 303; *Arkansas-Missouri Power Company v. City of Kennett* (C. C. A., 8th), 78 Fed. (2d), 911; *Allegan v. Consumers' Power Company* (C. C. A., 6th), 71 Fed. (2d), 477.

that action and it is not sufficient that he has merely a general interest common to all members of the public. *Tyler v. Judges of Court of Registration,* 179 U. S., 405, 406, 45 L. Ed., 252, 253, 21 S. Ct., 206; *Southern R. Co. v. King,* 217 U. S., 524; *Newman v. United States,* 238 U. S., 537, 549, 550, 59 L. Ed., 1446, 1451, 1452, 35 S. Ct., 881; *Fairchild v. Hughes,* 258 U. S., 126, 129, 66 L. Ed., 499, 504, 42 S. Ct., 274; *Massachusetts v. Mellon,* 262 U. S., 447, 488, 67 L. Ed., 1078, 1085, 43 S. Ct., 597. (Italics supplied.)

We submit that the petitioners have not shown a direct injury or invasion of a legal right by any act or combination of acts on the part of the defendants. What they are really complaining of is the creation of a situation containing potential damage to their business—a situation made up of two separate elements, (1) the undertaking by Greenwood County to engage in competition with them in the manufacture and sale of electric power, and (2) the financing of this competition by the Public Works Administration through a loan and grant to the County. If neither the first element nor the second, nor a combination of the two constitutes an invasion of petitioners' legal rights they clearly have no standing in Court.

We do not believe that petitioners any longer seriously question the legal right of Greenwood County to engage in competition with them. The County was given full power by the Legislature of South Carolina (XXXVIII S. C. Statutes 411, 1392, 1543; Appendix to Government's Brief, pp. 46, 65) to build and operate a hydro-electric plant at Buzzard Roost on the Saluda River; to sell the power in the three counties of Greenwood, Newberry and Laurens; to receive a gift of money from the United States; to borrow money for the construction of this project and to issue revenue bonds as security for the loan. The decision of the South Carolina Supreme Court in *Park v. Greenwood County,* 174 S. C., 35, 176 S. E., 870, fully settled all questions of constitutional and statutory power under state law.

The right of Greenwood County to build its plant and sell its power is not made less absolute by the fact that in doing so it will compete with the petitioners. This Court has held, in every case that has come before it involving an attempt by a holder of a non-exclusive franchise (such as petitioners have here) to avoid competition by a state or its political subdivision, that property rights in a public utility plant or in a franchise did not include the right to be free from competition, but that competition even by the sovereignty giving the franchise was a risk which was accepted by the private utility when it entered the field. *Puget Sound Power and Light Co. v. City of Seattle,* 291 U. S., 618; *Madera Waterworks v. Madera,* 228 U. S., 454; *City of Joplin v. Southwest Missouri Light Co.,* 191 U. S., 150.

Given this undeniable right of the County to engage in competition with petitioners and taking it to be equally as well settled that an unauthorized expenditure of federal funds by the Administrator in itself gives petitioners no right to complain (*Mass. v. Mellon,* 262 U. S., 447), it only remains to consider petitioners' contention that the combination of the County's competition and the Administrator's expenditure of federal funds constitutes a legal injury and gives them a standing in Court. This contention is based upon the premise that petitioners' position as public utilities with franchises from the State gives the right to be free from illegal competition and that competition aided by an unauthorized expenditure of federal funds by a federal officer is illegal. It is true that this Court has in the case of *Frost v. Corporation Commission,* 278 U. S., 515, announced the rule that the holder of even a non-exclusive franchise has the right to enjoy the use of that franchise free from illegal competition and may appeal to the Courts for protection when such competition threatens. The fallacy in petitioners' attempted use of this principle lies in the fact that the rule is properly and necessarily limited to cases where the competition itself is illegal, *i.e.*, where it is

in violation of valid laws of the particular state that has granted the franchise and prescribed the rights and duties attaching to it. When the state has specifically said through its Legislature and its highest Court, as South Carolina has done in our case, that the competition is lawful, the doctrine of *Frost v. Corporation Commission* and similar cases has no application.

Damages directly resulting from lawful competition are *damnum absque injuria,* even though that competition is caused or made possible by the unlawful conduct of a third person; *Railroad Company v. Ellerman,* 105 U. S., 166; *Chicago Junction Case,* 264 U. S., 258; *Sprunt & Son v. U. S.,* 281 U. S., 249.* The fact that the third party whose illegal act aided the lawful competition happened to be a public officer does not alter the principle upon which the decisions are based. To have any relief in the courts against the actions of such an official it must first of all be shown that his actions, disregarding their official nature, inflicted a legal injury on the plaintiff. It would only be after that determination that his official capacity would have any bearing on the situation.

The damage suffered by Duke Power Company would be the same regardless of where the money to build the County's plant came from. Let us suppose that instead of being a cabinet officer making this loan and grant, as petitioners charge, in violation of the statute and Constitution, the lender were an embezzler and making the loan and grant from federal funds which he had embezzled. Under those circumstances petitioners' legal injury—an injury suffered in common with all other citizens because of the illegal use of federal funds—could not be added to the damage resulting from the legal competition of the County so as to give rise to a cause of action. Petitioners' injury from the Administrator's acts in the case at bar is of exactly the same

* Since the Government's Brief will undoubtedly contain a detailed analysis of these important cases, we shall not attempt any discussion of them.

nature as in the case imagined. Neither in itself gives petitioners standing to sue and neither makes out a cause of action when combined with damage from legal competition.

Petitioners cite such cases as *Hitchman Coal and Coke Company v. Mitchell,* 245 U. S., 229; *Truax v. Raich,* 239 U. S., 33; *Hammer v. Dagenhart,* 247 U. S., 251; and *Pierce v. Society of Sisters,* 268 U. S., 510, as authority for the granting of injunctive relief against the Administrator if it can be shown that his illegal acts made possible the damage to the petitioners even though the immediate cause of that damage was the admittedly legal act of the County. An examination of these cases will show that in all of them the third party against whose illegal acts relief was granted was inducing the consummation of the damaging transaction by fraud or intimidation with the direct and sole purpose of causing damage to the petitioners. The touchstone of every decision in this line of cases is the element of malicious intent manifesting itself in a scheme or conspiracy to cause directly the very damage complained of. No such element of malice can possibly be found in the facts presented here. Even admitting that the evidence establishes all that the petitioners ask of it—that the Federal Government in making loans and grants has been motivated by a purpose of reducing private utility rates throughout the country—that objective is far different in the eyes of the law from malicious intent to do harm to the petitioners.

The District Court, while completely adopting in its Conclusion of Law No. 7 the view that petitioners cannot assert a cause of action based upon damages resulting from lawful competition, such damages being *damnum absque injuria,* held that petitioners would have a right to relief if they could show a regulation of their intra-state affairs by any agency other than the State of South Carolina regardless of whether such regulation resulted in damage to them or not. We do not agree with this theory of the District Court that a Court of Equity can allow injunctive

relief without a showing of substantial damages, either suffered or immediately impending; but we submit that when the Court adopted this view and still did not grant petitioners the relief they prayed, it gave an importance to its finding that there would in fact be no regulation of petitioners' rates by the Federal Government that such finding could not otherwise have had. Petitioners were put in the position of being able to sustain their case by showing merely that the situation would result in some type of regulation by the Federal Government. This they failed to do. By assuming a legal position as favorable as possible to petitioners upon their right to sue, the District Court threw open the doors to the merits of petitioners' case. It allowed them to go fully into the alleged Federal regulation and then with all the evidence before it and looking only for proof that Federal regulation, even if harmless, might result, the Court found as a fact that petitioners and their rates would not be subjected to any form of Federal regulation by this loan and grant to Greenwood County (R. 764, 870).

The Circuit Court of Appeals refused to follow this theory of the District Court as to the right to sue and reiterated its former holding that the bill should have been dismissed for lack of equity, adopting the simple and unassailable reasoning that (1) the county violates no legal right of the petitioners by competing with them; (2) the Administrator violates no legal right of petitioners in making loans and grants of public funds; and (3) there is no principle "upon which action which violates no right may be enjoined because in aid of another action which violates no right" (R. 870).

II.

The Enactment of Title II of the National Industrial Recovery Act is Within the Powers of Congress Under the General Welfare Clause

Since this litigation began, what was perhaps the most important constitutional question originally presented was definitely settled by this Court when it held in the case of *United States v. Butler,* 297 U. S., 1, that the power of the National Congress to make appropriations under the General Welfare Clause is not confined to those matters as to which Congress is given the right under the Constitution to legislate. After this putting to rest of a nation-old controversy, the only questions as to the power of Congress to enact Title II of the National Industrial Recovery Act which remained open were whether the relief of unemployment was in fact for the general welfare and whether a program of public works construction was a proper method for the relief of unemployment.

The first of these questions, at least, was settled during the last term of this Court in the Social Security decisions; *Steward Machine Co. v. Davis,* 57 S. Ct., 883, *Helvering v. Davis,* 57 S. Ct., 904, where it was held that the raising and spending of funds for the relief of unemployment and for benefits to the aged were proper exercises of the power of Congress to levy taxes and make expenditures to promote the general welfare. In the *Steward case,* the Court said:

> During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more. Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy. The fact developed quickly that the states were unable to give the requisite relief. The

problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States v. Butler,* 297 U. S., 1, 65, 66, 56 S. Ct., 312, 319, 80 L. Ed., 477, 102 A. L. R., 914; *Helvering v. Davis,* 300 U. S., .., 57 S. Ct., 904, 81 L. Ed., .., decided herewith. The nation responded to the call of the distressed. Between January 1, 1933, and July 1, 1936, the states (according to statistics submitted by the government) incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938 the national government expended for public works and unemployment relief for the three fiscal years 1934, 1935, and 1936, the stupendous total of $8,-681,000,000.

Equally forceful language is found in the *Helvering case* where it is particularly pointed out that the discretion necessarily existing in the determination of what appropriations are for the general welfare as distinguished from local welfare is a discretion belonging to Congress and before an exercise of Congress' spending power can be found by the Court to be unconstitutional there must be a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress.

It is interesting to note that the District Court rested the constitutionality of Title II of the Recovery Act, at least in part, upon a power broader and more fundamental than that usually considered to be granted by the General Welfare Clause, holding (R. 764-67) that appropriation of

monies by the Federal Government to subdivisions of states for the construction of public works is justified by the power, inherent in the very nature of our dual form of government, of one sovereignty to aid another. It is certainly true that this Court in the Social Security cases upheld the right of Federal and State Governments to deal with each other as sovereigns in coping with problems common to both which neither could effectually meet alone, and whether or not it was intended to state this power as one distinct from that given to the Federal Government by the General Welfare Clause, the decisions have added immeasurably to our concept of the sovereignty of both Federal and State Government.

There remains, then, only the question as to whether, admitting the power of Congress under the General Welfare Clause to relieve nation-wide unemployment, appropriations for the construction of public works throughout the nation is a proper form for such relief to take. The idea of a program of public works as a means of alleviating unemployment is, of course, not novel, it having been accepted by economists and political philosophers since the days of Pericles as perhaps the most practical method of giving work to those who need it and obtaining at the same time something of lasting value to all. Congress, realizing, as other Congresses and other Administrations had done before, that such a program would increase employment not only in the actual construction of the project but in all industries connected with the production and transportation of materials, seized upon this historic method as being as appropriate a weapon against unemployment as was available to it. The results have justified Congress' hope. Defendants' Exhibit 76, a Department of Labor pamphlet entitled "Employment Created by PWA Construction", which is being sent up with the Record, contains findings by the Bureau of Labor Statistics that the activity of the Public Works Administration had resulted by August, 1936,

in the employment of approximately 6,475 man-months of labor. It is stated as a conservative estimate that for each person put to work at the site of the projects 2½ additional persons were given employment away from the site.

Petitioners' position as to the unconstitutionality of Congress' authorizing the construction of public works for the relief of unemployment comes simply to saying that since each separate project is local in its nature, the program cannot be for the general welfare. In Title II of the National Industrial Recovery Act Congress did not attempt to make appropriation for any individual project, the appropriation being instead for "a *comprehensive program* of public works." The construction of individual projects might be, when taken by themselves, of only local benefit but the program as a whole is for the benefit of the nation. The relief of unemployment, to have any national effect must necessarily be accomplished in unconnected localities by putting unconnected individuals back to work.

Petitioners seem to argue further that the program of public works authorized by the Act is not for the general welfare because the uses of the various projects after construction will be for the benefit of the localities where they are situated. The purpose of Congress in providing for a comprehensive program of public works is fulfilled in the *construction* of the projects so as to provide for an increase in employment. The *use after construction* was not within the purview of the Act and the fact that incidental local benefits will result through the use of the projects cannot affect the fundamental fact that Federal aid in their construction is part of a comprehensive national program of public works appropriately designed to promote the general welfare.*

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* In saying that Congress, being primarily engaged in relieving unemployment, was not interested in the local benefits to be derived from the use of the public works, we are not implying a belief that a consideration of such local incidental benefits or a manifest desire for them by Congress would make the Act any the less constitutional. The greatest

There is no justification for petitioners' argument that Title II is beyond the powers of Congress because power plants which might compete with those of private industry are included in the list of projects eligible for loans and grants. The determination of the type of project desired was naturally left by Congress to the applicant. Whether or not a competitive power plant was desirable was a question of policy for the state government to decide. Greenwood County wanted such a plant and the Legislature of South Carolina has determined that it is proper for the county to have and operate such a plant. We do not believe that Congress would have been justified in saying to us that we could not have a power plant because of possible competition with private utilities and that since we did not need or desire any other type of project we could have no part at all in the public works program.

In the list of eligible projects contained in Title II, no emphasis is given to competitive power plants or any other type of competitive projects. Certainly it cannot be said that a simple refusal by Congress to exclude power projects from this list makes the Act unconstitutional.

III.

The Aid Given by the Federal Government to Greenwood County is Within the Powers of Congress Under the Commerce Clause

Although our fundamental position is that Congress has validly authorized the making of this loan and grant under the General Welfare Clause of the Constitution and the Courts below have passed only upon this power, we believe that this particular loan and grant has, in addition,

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advantage of a program of public works over other systems of unemployment relief is the accomplishment of permanent local benefits, and it cannot be said that in order to pass a valid Act Congress had to close its eyes to this advantage. The Federal Government can manifest the cooperation with state sovereignties approved by this Court in the Social Security cases in no more salutary manner than by aiding the states and their sub-divisions in the acquisition of much-needed public works.

constitutional validity under the Commerce Clause as an aid to navigation.

Although the Saluda River at the point where the Buzzard Roost dam will be built is not accessible to water craft from the sea, the flow of the river at this point does affect the navigability of the Congaree-Santee system (R. 400-402).

The Federal Power Commission which has authority to act only upon a showing that the navigability of rivers affects interstate commerce (16 U. S. C. A., 797), has found that the project here does affect interstate commerce (R. 400). The determination by the Federal Power Commission of this question of fact is conclusive.

Morgan v. U. S., 298 U. S., 468.

This Court has frequently confirmed Congress' right to control the flow of water in streams which affect navigation, even though the stream at the point involved is not actually navigable.

U. S. v. Rio Grande Dam & Irrigation Co., 174 U. S., 690.

Egan v. Hart, 165 U. S., 188.

New Jersey v. New York, 283 U. S., 336.

That purposes other than navigation will also be served in the construction of the dam is immaterial.

Arizona v. California, 283 U. S., 423.

IV.

Title II of the National Industrial Recovery Act Does Not Violate the Tenth Amendment

Petitioners argue their contention that Title II infringes upon the reserved rights of the state and violates the Tenth Amendment as a proposition separate and distinct from the fundamental question of Congress' powers under the General Welfare Clause. To us their position that the statute intrudes upon the reserved rights of the

state is simply the converse of their position that no constitutional power exists for the enactment. If a particular power is found to have been delegated by the Constitution to the Federal Government, the Tenth Amendment by its very language has no application. This view seems to us to be supported by the Court's treatment of the constitutional questions in the Social Security cases, particularly *Helvering v. Davis, supra.* This separation of approaches to what should be the same basic inquiry may itself be taken to demonstrate the fallacy inherent in petitioners' argument. Not being able to find any invalidity in what Congress has done by regarding the Act itself with its undeniably legitimate purpose, petitioners find it necessary to go further and argue that unconstitutionality is established because of collateral and indirect effects of the legislation. They are contending that, even if this Court finds ample authority under the Constitution for Congress to have enacted Title II of the National Industrial Recovery Act, that power must be disregarded and considered as non-existent if the Statute can be shown in some aspects of its application to have the effect of regulating matters non-federal in character; *and this although the instances involving alleged regulation are infinitesimal in proportion to other applications of the statute.*

We submit that there is no authority for such position. When the power of Congress to enact a particular law can be pointed out in the Constitution the fact that the incidental effect of the legislation might be beyond the scope of the Government's enumerated powers does not invalidate the law. Petitioners have cited on page 55 of their brief the cases of *Collins v. New Hampshire,* 171 U. S., 30, and *Hammer v. Dagenhart,* 247 U. S., 251, for the rule that the *purpose* of an act of Congress "must be determined by its natural and reasonable effect." They cannot seriously be contending that the natural and reasonable effect of the comprehensive statute we are considering is to regulate

their electric rates in South Carolina. They have never even argued that the underlying purpose of Congress in enacting Title II of the National Industrial Recovery Act was to force them to reduce their rates.

Collateral Effects Cannot Invalidate Statute

We understand the well-settled rule of constitutional interpretation to be that where a statute itself contains no regulatory provisions the Court will not condemn it as violative of the Tenth Amendment even if its collateral effect is the regulation of intrastate activities. This principle has been established in a long line of cases, has never been denied or questioned by any decision of this Court and has been recently re-stated and re-affirmed in the case of *Sonzinsky v. United States,* 300 U. S., 506. The petitioner there contended that the tax imposed by the National Fire Arms Act, the violation of which he was convicted of was not a true tax but a penalty imposed for the purpose of regulating traffic in fire arms, the local regulation of which is reserved to the states under the Tenth Amendment. This Court in a unanimous opinion held that the tax was valid as an exercise of a proper Congressional power and that it could not consider whether it operated as a regulation or was intended by Congress as a regulation of matters beyond the Congress' power.

The Court, in reviewing the authorities, demonstrated that there were two separate lines of decisions necessitating different approaches—one, exemplified by the *Child Labor Tax Cases,* 295 U. S., 20, *Hill v. Wallace,* 259 U. S., 44, and *Carter v. Carter Coal Co.,* 298 U. S., 238, holding that where a statute although purporting to be passed under an admitted federal power such as the taxing power, actually contained provisions regulating or authorizing the regulation of intrastate activity, it must be condemned as violative of the Tenth Amendment; the other, holding that where

a statute comes within proper Congressional power and contains on its face no regulatory provisions, it will not be stricken down even though its collateral and incidental effect will be to accomplish something which Congress has no power under the Constitution to accomplish directly. As examples of the latter line of decisions the Court cites *Veazie Bank v. Fenno,* 8 Wall., 533; *U. S. v. Doremus,* 249 U. S., 86; *McCray v. U. S.,* 195 U. S., 27; *Smith v. Kansas City Title Co.,* 255 U. S., 180; *Arizona v. California,* 283 U. S., 423; *Hampton & Co. v. U. S.,* 276 U. S., 394.

In some of these cases, notably *Hampton & Co. v. U. S.,* and *Smith v. Kansas City Title Co.,* it will be found that the rule was applied, although Congress had declared in the Act that it had a desire for the collateral result.

The case of *U. S. v. Butler,* 297 U. S., 1, relied on almost exclusively by the petitioners in their argument as to violation of the Tenth Amendment, when examined is found to be of that class of cases dealing with statutes which themselves contain explicit provisions authorizing the regulation of intrastate activities. The Court, in the *Butler case,* held that the tax resisted was an incident of a statutory plan for regulating agricultural production, which statutory plan invaded the reserved rights of the states. The Agricultural Adjustment Act showed a direct purpose on the part of Congress to regulate, the plan for the regulation and control of intrastate activities appearing clearly throughout the statute.

On the other hand, in Title II of the National Industrial Recovery Act there is no provision at all regulating or authorizing the regulation of intrastate rates. There is no indication in the Act that Congress desired or even anticipated that regulation of intrastate rates would result. If such regulation does in fact occur, it will be a collateral or incidental result of the operation of the statute so as to come within the rule applied in the *Sonzinsky case* rather than within the rule applied in the *Butler case.*

It is clear that Congress in enacting Title II had no purpose to regulate petitioners' rates, nor, we submit, was there present even a purpose to cause competition to the petitioners. The competition will be purely an incidental consequence of Congress' primary purpose, the promotion of the general welfare by increased employment. The only way that Congress could have avoided the incidental effect would have been to provide that no loans and grants could be made where competition with private industry might result. This it refused to do, and wisely, because it is clear that such a provision would have almost completely nullified the program. Not only, to avoid competition with private industry, would Congress have had to deny loans and grants for power projects, but other types of projects would have had to be limited. It is difficult to imagine any type of useful project which might not offer competition to an established private enterprise. Public hospitals would compete with private hospitals; public schools with private schools; public swimming pools with private swimming pools; publicly owned bridges with private toll bridges, and so on through the entire list. States and municipalities would have found it difficult, if not impossible, to select projects which they desired and which they were willing to borrow money in order to possess. It seems to us an unwarrantable proposition that the mere fact that Congress *permitted* the making of loans and grants for competitive power projects could invalidate the Congressional Act.

Regulation is Illusory

We have argued that the collateral or incidental effects of the Federal Statute, even if those effects were a regulation of intrastate rates, would not invalidate the statute. It is our position, however, that Title II cannot be said to have even the incidental effect of regulating the petitioners' rates. It is true that the construction of the

Greenwood County project will result in competition to the Duke Power Company although the evidence shows that the competition from this small hydro-electric project will be of no great importance. Such *competition* is, we submit, not *regulation* in any sense and certainly not in the sense of regulation in violation of the Tenth Amendment. The only actual regulation of petitioners' rates possible in South Carolina is regulation by the State. The Federal Government does not have in South Carolina, and cannot have as long as our system of dual sovereignty exists, any system or machinery whereby it could regulate intrastate rates even if it desired to do so. Its rights under the existing loan and grant agreement with the county, as we have demonstrated and as we believe petitioners admit, certainly give it no such right of regulation.

The State of South Carolina has entrusted its power to regulate the petitioners' rates to a state agency, the South Carolina Public Utilities Commission, which has the power to apply any *just* standard that it desires to the petitioners' rates to determine whether or not they are proper. If the yardstick which petitioners claim will be afforded by the rates of Greenwood County is in fact a *just* yardstick, measuring exactly 36 inches, petitioners cannot complain of its application by the Commission. If, however, as the two Courts below have found, the rates of Greenwood County do not constitute a just yardstick on account of the entirely dissimilar nature of the financial and political setup of the two systems, the Public Utilities Commission will not use it. In neither case can plaintiffs be damaged.

Since Commissions and Courts in fixing utility rates take into consideration reproduction cost, and since Greenwood's construction contracts will be public records, it may be that the South Carolina Public Service Commission will obtain from the Greenwood records certain information as to the cost of items which go into electric utility construction. Similar information, however, would be available to

the Public Service Commission whether the plant were built in the United States or in a foreign country, and a private utility cannot complain because the Public Service Commission obtains correct information about construction costs.

We insist that competition is not regulation, but even if we accept petitioners' position that the competition here does amount to regulation, we think it is clear that such regulation will be regulation by the State of South Carolina and its sub-division, Greenwood County. The Federal Government will have absolutely no right to control or regulate the operation of the rates of the Greenwood County plant. Such control and regulation is in Greenwood County, subject to the general powers of the State Legislature. The State, through its sub-division, will be doing only those things which it has always had a right to do and petitioners have no more right now to complain of the doing of those things than they have always had. If, as petitioners contend, the rates of the Greenwood County plant are to be used as a yardstick to apply to their rates, the yardstick will be a State yardstick and one which the State has always had the power to use.

The Statute Involves no Coercion of the Sovereignty of the State

Petitioners' argument is that the State by the acceptance through its subdivision, Greenwood County, of Federal funds for the financing of the proposed project has been coerced into giving up matters properly within its exclusive control. Authority for this position is sought from the case of *United States v. Butler, supra,* where this Court held as violative of the Tenth Amendment "a scheme for purchasing with federal funds submission to federal regulation of a subject reserved to the states." The difference between the coercion found to exist in the *Butler case* and the elements of our case alleged by plaintiffs to show co-

ercion are obvious. Under the Agricultural Adjustment Act the Federal Government was found to be giving money to private persons for the purpose of controlling matters properly under state control. This was being done without the consent of the state and very possibly in direct opposition to state policy. The Administrator's actions in our case do not in any sense restrict the powers of the state but only furnish to the state means of exercising a power that has always existed. It cannot be said that the state's power is encroached upon by the giving or accepting of financial aid in the furtherance of a declared state policy.

The State did not accept the loan and grant under any compulsion or coercion. It knew that federal monies for the construction of public works were available to it if it could satisfy certain conditions, but it was purely a matter of choice for the state, or its subdivision as to whether it would avail itself of a loan and grant from these funds for construction of a public works project. It was also a matter of choice for the state as to what type of project it desired.

We of the County submit, and the evidence in this connection is uncontradicted, that it was Greenwood County's desire for a hydro-electric plant, uninspired by any federal agency, that led to the application and that it was Greenwood County's perseverance that led to the allotment. Our volition has never been swayed or attempted to be swayed by any word or act of a federal employee.

Furthermore, neither Greenwood County nor the State of South Carolina has given up anything as a result of Title II or as a result of the Administrator's acts. The control of rates remains in the sovereignty of the State of South Carolina where it has always been. This control goes not only to the rates of Duke Power Company, but also to the rates of the municipal plant. That the South Carolina Legislature can control County government and all matters

connected therewith throughout the state is a doctrine well preserved by our South Carolina Courts.

Park v. Greenwood County, 174 S. C., 35, 176 S. E., 870.

Heslep v. State Highway Department, 171 S. C., 186, 171 S. E., 913.

Duke Power Company v. Bell, 156 S. C., 299, 152 S. E., 865.

Although at the present time rates charged by governmental subdivisions maintaining public utilities are not controlled by the Public Service Commission of the state, there is nothing in our State Constitution or in any of the decisions of our highest Court indicating that the Legislature cannot put such rates within the jurisdiction of the Public Service Commission or supervise them in any manner it sees fit.

1 *McQuillin, Municipal Corporations,* 642, Sec. 251.
27 *R. C. L.,* 1442, Sec. 59.

There was presented to us no choice of yielding or suffering ruin as was found by this Court in the *Butler* decision to have been offered to the farmers under the Agricultural Adjustment Act. The language of Mr. Justice Sutherland in *Massachusetts v. Mellon,* 262 U. S., 482, is applicable in this connection:

> Nor does the statute require the states to do or yield anything. If Congress enacted it with the ulterior purpose of tempting them to yield that purpose may be effectively frustrated by the simple expedient of not yielding.

Even more to the point is the opinion of this Court in the recent case of *Steward Machine Company v. Davis, supra,* where the argument that the sovereignty of individual states was being relinquished in exchange for benefits offered by federal statute was capable of a much stronger presentation than it is in the case at bar. Under Title IX of the Social Security Act the states were in effect given their

choice of creating a state unemployment compensation fund or seeing all of the tax imposed by the federal statute go to the federal fund. In our case the decision by the state not to apply for a federal loan and grant would involve no disadvantage other than not possessing the completed plant, with the accompanying financial obligations. In other words, South Carolina under Title II of the National Industrial Recovery Act had the choice of getting something which they did not have or of keeping what they had. The states under Title IX of the Social Security Act were given the far more urgent choice of getting something or of giving up something which they had.

The Circuit Court of Appeals thus discusses the effect of the *Steward case* upon the Tenth Amendment argument presented by the petitioners here (R. 861):

> Likewise, our conclusion that the statute cannot be condemned as an invasion of the reserved powers of the states is fortified by the decision in *Steward Mach. Co. v. Davis, supra,* wherein the Court said that before a statute could be condemned on this ground there must be a showing that the things which it authorizes are "weapons of coercion, destroying or impairing the autonomy of the states." 57 S. Ct., 890. The carrying out of the program of public works authorized by the statute for the relief of unemployment cannot possibly have this effect; and, specifically, the making of loans and grants to municipal corporations to enable them to engage in enterprises which the states have authorized them to engage in cannot, in any use of language, be said to abridge or invade the powers of the states. As we said in our former opinion, "It is an entirely different thing from giving or lending money to private persons for the purpose of defeating a state policy or regulating matters under state control." Any effect which such loans and grants may have upon rates will be incidental to the competition engendered by the construction of the projects; and where the state itself authorizes the projects and the procuring of the loans and grants for their construction, as did South Caro-

lina in this case (*Park v. Greenwood County, supra*), and retains the right of regulating the rates through the exercise of state power, it cannot be contended with any show of reason that the power of the state is encroached upon by the making of the loans and grants or by the competition resulting from the construction of the projects which they make possible.

V.

There is in Title II no Unlawful Delegation of Legislative Power to the Executive

The authority conferred by Title II of the National Industrial Recovery Act upon the President and the Administrator of Public Works is not such delegation of legislative power to a branch of the executive as was condemned by this Court in the case of *Panama Refining Co. v. Ryan,* 293 U. S., 388, and *Schecter Bros. v. U. S.,* 295 U. S., 495.

The standard laid down in the *Panama Refining Company case,* following the established precedents of *Hampton v. U. S.,* 276 U. S., 395, and *Field v. Clark,* 143 U. S., 649, may be found in the following language:

> Accordingly we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President, in the exercise of the authority to enact the prohibition.

In the statute contested here the policy of the Congress to provide a comprehensive program of public works for the relief of unemployment could be no more clearly stated. In Sections 202 and 203 we find ample standards to guide the President in making his allocations. Various classes of eligible projects are enumerated and the President and Administrator are required to find in the making of each loan that it will increase employment quickly and that the United States Government will be reasonably secured in it.

That it was necessary for the Congress to place in ad-

ministrative officers certain discretion in the approving of particular projects is obvious. It would have been impossible for Congress in 1933 to determine which of the thousands of applications should be granted, regarding in each case the legal and financial soundness. The rule is well established that the necessities of the case will justify leaving a broad discretion in administrative officers.

Butterfield v. Stranahan, 192 U. S., 470.
Union Bridge Co. v. U. S., 204 U. S., 364.
Monongahela Bridge v. U. S., 216 U. S., 177.

This rule was recognized in both the *Schecter* and the *Panama Refining Company cases.*

The recent decision of *Cincinnati Soap Company v. United States,* 301 U. S., 308, is in itself almost a complete answer to petitioners' argument as to delegation of legislative power. There Congress had provided for the payment to the Philippine Government of the proceeds of a tax levied on the processing of Philippine coconut oil without placing any restrictions upon the use by the Philippine Government of the funds paid over to it. Mr. Justice Sutherland, speaking for the whole Court, said:

> The validity of the act disposing of the tax is also attacked as constituting an unlawful delegation of legislative power. That Congress has wide discretion in the matter of prescribing details of expenditures for which it appropriates must, of course, be plain. Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. A striking and pertinent example is afforded by the Act of June 17, 1902, c. 1093, 32 Stat., 388, where all moneys received from the sale and disposal of public lands in a large number of states and territories are set aside as a special fund to be expended for the reclamation of arid and semi-arid lands within those states and territories. The expenditures are to be made under the direction of the Secretary of the Interior upon such projects as he may deter-

mine to be practicable and advisable. The constitutionality of this delegation of authority has never been seriously questioned. See *United States v. Hanson*, 167 Fed., 881, 884-885.

Even if it could be said that the original Recovery Act did not provide sufficiently definite standards for the actions of the Administrator and gave to him legislative power, Congress by subsequent enactments has so adopted the previous administrative interpretation of the Act as to provide adequate standards to guide the Administrator in his future expenditures.

Pursuant to Senate Resolution 190, the Administrator furnished to the Senate a document, Defendants' Exhibit 70, giving an account of his stewardship to date, setting out clearly the policies of the PWA, its organization, the procedure used in handling allotments, the standards applied, and a list showing the approved projects.

Thereafter Congress enacted the Emergency Appropriation Act, Fiscal year 1935 (Appendix to Government's Brief, p. 24), authorizing expenditures of $500,000,000.00 for public works under Title II. On April 8, 1935, Congress enacted the Emergency Relief Appropriation Act of 1935 (Appendix to Government's Brief, p. 26), which continued the existence of the Public Works Administration and authorized the continuance of its functions. On June 22, 1936, Congress passed the First Deficiency Appropriation Act, Fiscal year 1936 (Appendix to Government's Brief, p. 37), by which the Public Works Administration was authorized to spend $300,000,000.00 for the making of loans and grants "of the kind and character for which the Federal Emergency Administration of Public Works has heretofore made loans and grants pursuant to Title II of the National Industrial Recovery Act or the Emergency Relief Appropriation Act of 1935."

This continuation by the Congress of the functions of the Public Works Administration, with the facts as to what

the Administration was doing fully before it, amounts to complete ratification of the acts of the Administrator and the adoption by Congress as proper of the standards and procedure used by the Administrator.

It is to be noted that the 1936 statute particularly ratified the Greenwood County project.

For legal authority as to the effect of these subsequent ratifications and adoption by Congress of what has been done by the executive, it is necessary only to cite the two recent cases of *Isbrandsten-Moller Co. v. U. S.*, 300 U. S., 139, and *Swayne & Hoyt, etc., Co. v. U. S.*, 81 L. Ed., 400.

VI.

In Making the Loan and Grant to Greenwood County the Administrator is Not Violating the Statute

Petitioners' argument as to the alleged violation of the statute by the Administrator stresses only slightly the contention which actually should be the whole of their argument as to the Administrator's actions; *i. e.*, that Title II of the National Industrial Recovery Act does not *authorize* the making of loans and grants to aid in the construction of electric plants which will compete with private enterprise.

Title II does clearly authorize the making of the loan and grant here contested. The construction of hydro-electric projects is clearly included within the enumeration of the items that by Section 202 of the Act make up the comprehensive program. The legislative history of the Act discloses that Congress intended to include within the program projects of the type here involved (77 Congressional Record, 5053; Appendix to Government's Brief, pages 78 *et seq.*).

The Administrative interpretation of the Act and the fact that within the program was included numerous hydro-electric projects in territories where private utilities were serving was brought to the notice of Congress by Reports

of the Administrator (Defendants' Exhibits 70, 71, 72, 73 and 74). With this knowledge, Congress made further appropriations for and continued the functioning of the Public Works Administration in three consecutive years, as we pointed out under V above.

In enacting the Emergency Relief Appropriation Act of 1935, Congress rejected a proposal to limit public works projects to those which would be non-competitive with private enterprises (Appendix to Government's Brief, p. 78).

In the First Deficiency Appropriation Act, Fiscal year 1936, Congress made special provision to insure that municipal power projects involved in litigation would not be defeated by a lapse of time (Appendix to Government's Brief, p. 38).

It is undeniable then that the Administrator is acting within the express authority of the statute when he makes a loan and grant for the construction of a municipal power plant. What petitioners say, however, is that regardless of the clear authority under the statute for the Administrator to do just what he has done here, if he has made this loan and grant looking to a reduction of petitioners' rates, the loan and grant is invalid. Although they admit that the *effect* of the loan and grant is what will accomplish their alleged regulation and that this effect would ordinarily follow the making of the loan and grant regardless of the purposes or policies behind its making, they take the position that if the reduction of private utility rates is desired by the Administrator, is planned by him, is a part of his broad policy or is used as a criterion in passing on applications, that in itself makes his action illegal.

This contention that an improper motive or desire accompanied the doing by the Administrator of an authorized act so as to invalidate the act was met by the Circuit Court of Appeals on three separate grounds. The Court said:

There are several answers to this, each of which seems to us to be complete and final.

In the first place, the Court below has found, and the finding is supported by evidence, that the Administrator was not actuated by such motive in making the loan and grant to the County. * * * (R. 866).

* * *

In the second place, the Administrator in selecting projects to which loans and grants are to be made under the statute must necessarily exercise an administrative discretion, so as to extend aid to projects which are financially sound and the construction of which will be in the public interest. If, in exercising this discretion, he adopts the policy of not making loans and grants for municipal projects which will not provide rates to the public lower than competing private enterprises, such policy would seem to accord both with sound finance and with the requirements of justice to existing enterprises (R. 866).

* * *

In the third place, even if the Administrator had the motive attributed to him by plaintiffs, and even if this be an improper motive, the validity of his action is not affected thereby (R. 867).

Since we have gone rather fully under our *Discussion of Facts,* above, into the evidence supporting the District Court's finding that the Administrator in making the loan and grant to Greenwood County had no purpose other than that of relieving unemployment through the construction of useful public works, we do not consider any further discussion of the facts establishing this to be necessary. We do not believe that all the testimony brought forward by the petitioners to show that the Administrator is using his office for the accomplishment of his personal desire to reduce utility rates can even tend to refute the combination of two simple and uncontradicted facts: (1) that the allotment to Greenwood County was obtained only after vigorous and persistent efforts by the County, and (2) that

of the entire number of Public Works projects approved by the Administrator only 98/100 of 1% have been competitive power projects.

We further believe that the Circuit Court of Appeals' second answer to the petitioners' argument as to improper motives is sound, although neither we of the County nor counsel for the government argued this view in the Courts below. We have shown that the Administrator had of necessity very broad discretion in approving applications for public works projects. There were many applications for power projects and not all of them could be approved. If the construction of two projects would equally create employment, if the loans to both would be equally secure, and if the other statutory requirements were met in both cases and the Administrator must still choose between them, he would naturally give the project to the community in which it would do the most good. The determination of which project would be of the greatest and most lasting benefit to the citizens of the community would in most cases rest upon whether the proposed municipal plant would give rates lower than those then being provided by private utilities. As Judge Parker said in his opinion:

> • • • There is nothing in law or common sense which requires the Administrator to ignore such considerations in the exercise of the discretion reposed in him. Congress could certainly have provided that no loans or grants should be made under the Act to a municipal enterprise in cases where an existing private enterprise was furnishing service to the public as cheaply as the municipal enterprise would furnish it; and we see no reason why such criterion may not and should not be adopted by the Administrator. He is not required to select the projects on his program by lot or to close his eyes to the interests of the public or the social desirability of projects among which he must choose. • • •

What petitioners are really saying is that the Administrator would never be justified in making a loan and grant for a publicly owned power plant if any competition with private industry would result. Competition and resulting damage to private business could not be avoided by the Administrator if he were to carry out the Public Works program as it was intended. Conceivably almost any useful project desired by an applicant might result in competition for some industry. For him arbitrarily to have refused allotments where there was danger of competition would have caused the collapse of the Act's administration and thwarted Congress' purposes to relieve unemployment.

Petitioners in that section of their Brief beginning on page 38, give the impression that the Administrator was free under Title II to make up the Comprehensive Program of Public Works of whatever types of projects he saw fit and that it was in the exercise of his own discretion that power plants were included among the projects for which loans and grants were available. This position is unjustified since the Administrator was specifically instructed by the Act to make loans and grants for projects of the type involved here.

Section 203-(a) of Title II (Appendix to Government's Brief, page 4) provides:

> With a view to increasing employment quickly * * * the President is authorized * * * to construct, finance or aid in the construction or financing of any public-works project included in the program prepared pursuant to Section 202 * * *.

Section 202 of Title II (Appendix to Government's Brief, page 3) provides that

> The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: * * * (b) conservation and development of natural resources, including control, utilization and purification of waters, * * * de-

> velopment of water power, transmission of electrical energy and harbor improvement and flood control * * *.

Thus it is obvious that even had the Administrator desired to, he could not have refused to make loans and grants for municipal power projects without violating the statute under which he was acting. The Act required the inclusion of power plants in the public works program, whether the Administrator approved of that inclusion or not, and no act or statement of the Administrator could defeat Congress' desire of having loans and grants made for municipally owned power projects. Petitioners, it seems, would deny this. Their argument actually comes to saying that since the Administrator has indicated a personal approval of municipal power projects, no loan and grant for such a project can be valid, being presumably a furtherance of the Administrator's own desires rather than of the will of Congress. If this theory were true and Mr. Ickes had been an enemy of municipal ownership, he could have completely defeated the clear language of the Act by the simple expedient of announcing publicly that he was in favor of lower rates and proposed to use his power as Administrator to accomplish a lowering of existing rates.

The statute authorized the Administrator to take as security for the loans he was instructed to make either general obligation bonds or revenue bonds. At the time the Recovery Act was passed and the Administrator began to carry out the program, the finances of State governments and their political subdivisions were in precarious condition, most of the governmental units having already reached state constitutional limits on general obligation bonds. Therefore, if the Administrator were to make sufficient loans to carry out the purpose of Congress to increase employment throughout the nation, he had to take revenue bonds which could be financed outside of constitutional debt limitations, and which necessitated the construction of projects which would actually produce revenue. Projects of this

character are much more likely to compete with private enterprise than the ordinary type of projects secured by general obligation bonds. The incidental creation, therefore, of competition is caused not by the Administrator's volition but by the necessities of the case.

We come, finally, to the third position assumed by the Circuit Court, that is, that even if the Administrator has the motive attributed to him by the petitioners, and even if this is an improper motive, the validity of his action is not affected thereby. The existence of an ulterior motive on the part of a public officer cannot invalidate his official acts if those acts are within his proper powers.

Dakota Telephone Co. v. South Dakota, 250 U. S. 163.
Spalding v. Dickinson, 161 U. S. 483.
West v. Hitchcock, 205 U. S. 80.
De Cambra v. Rogers, 189 U. S. 119.
Philadelphia v. Stimson, 223 U. S., 605.

The principle established by these cases has been recently re-affirmed by this Court in the case of *Isbrandtsen-Moller Company v. United States,* 300 U. S. 139. The complainant there charged that an order of the Secretary of Commerce, despite its recitals of legitimate purpose, sprang from illegal motives. The Court in a unanimous opinion said that the case was controlled by "the principle that if the order is justified by a lawful purpose, it is not rendered illegal by some other motive in the mind of the officer issuing it."

Since the first decision of the Circuit Court of Appeals in this case holding that the motive of the Administrator was immaterial and since the opinion in the *Isbrandtsen Case* was handed down, the petitioners have changed the name of the element which they claim can be added to the Administrator's admittedly legal actions so as to make them illegal from "motive" to "criterion". In changing the name, however, they have not changed their argument. What they are now saying, as we understand it, is this:

That although the Loan and Grant Agreement with Greenwood County is on its face legal, it becomes illegal because in passing upon the application an illegal criterion has been used by the Administrator—this criterion being whether or not existing electric rates will be reduced by the making of the loan and grant.

To us there is no real distinction between the meaning of the word "criterion" as now used, and the word "motive" as formerly used by petitioners in their argument. What petitioners object to and what they claim will damage them is the alleged requirement that electric rates be reduced. Whether this requirement is manifested in an illegal criterion or is the result of an illegal motive, it seems to us to come to the same thing. In all of the cases which we have cited holding that where an Act is within the power of an officer it is not rendered illegal by any improper intention on the part of that officer, the Court uses the word "motive". It is inconceivable that the result of any of these decisions would have been changed had the Court substituted the phrase, "the application of an extraneous criterion" for "the existence of an ulterior motive".

Petitioners have themselves conceded that the Administrator's intention is irrelevant by taking the position that, regardless of the use of this alleged criterion or the existence of this alleged motive, the necessary and unavoidable effect of the making of the loan and grant to Greenwood County would be a forcing down of their rates through competition. By their own argument they will suffer exactly the same results, no matter whether those results were intended by the Administrator or not, since competition flows directly from *any* administration of the statute that permits loans and grants for power projects.

In other words, petitioners' argument comes in its final analysis to a contention that the collateral effect of the statute can invalidate it, a complete answer to which

position is found in the *Sonzinsky Case, supra,* and the cases therein cited.

If petitioners' argument is sound that allotments cannot be made where they will result in lower power rates, that entire portion of the Recovery Act which provides for financing projects to develop water power and transmission of electric energy will fail. If the proposed municipal plants must charge higher rates than the competing private utility, no plants will ever be built and this for two reasons: (1) Local communities would not ask for a plant which would result in higher rates than those prevailing in the locality; and (2) loans from the Federal Government would not be reasonably secured because the municipal plants would be unable at higher rates to obtain the business.

VII.

The Petitioners' Evidence, Consisting of the Testimony of Frank T. Post, Edwin Vennard, D. E. Byerley and George Carter and Plaintiffs' Exhibits 50 to 74, was Not Competent Evidence in This Case

The testimony of these witnesses and these Exhibits were received by the District Court at the time of the final hearing but their existence in the Record did not keep either the District Court or the Circuit Court of Appeals from holding that the Administrator was not motivated in making this loan and grant by any purpose or plan unauthorized by the statute. We have, therefore, in our *Discussion of Facts* above, treated this evidence as properly before the Court. However, we do believe it was clearly incompetent and offer the position that it was improperly in the Record as additional grounds to sustain the decisions below.

This evidence consists of the recounting of conversations between representatives of power companies and em-

ployees of the Public Works Administration, and correspondence between the same parties, with reference to applications for loans to municipalities other than Greenwood County. Petitioners offered this evidence for the purpose of showing that the Public Works Administration in considering applications from these municipalities did not grant or refuse allocation of funds on the basis of the standard set up in Title II of the Recovery Act and of the rules made pursuant thereto, but granted or refused the loans upon the basis of whether or not the private utility in that area would reduce its rates.

The most important thing to note is that no testimony showing any connection between the handling of Greenwood County's application and the handling of the application of any of these municipalities was offered. No application from South Carolina was included in the group, which consisted of municipalities in the mid-west, Texas, Idaho, and one in Florida. The defendants objected to all this evidence upon numerous grounds (R. 572), including the ground that it was irrelevant; was not admissible as an admission against interest so far as Greenwood County was concerned; that it was hearsay; that there was no proof of the authority of the person writing the letters and making the statements; that the terms of the contract between Greenwood County and the Public Works Administration are clear and the contract itself required no evidence for explanatory purposes.

A. The testimony is irrelevant to any issue in this case.

The only issue involved in this case to which petitioners could possibly contend this testimony is relevant is as to whether the Administrator in making the loan and grant to Greenwood County violated the terms of Title II of the National Industrial Recovery Act. Their argument, as we understand it, is that the testimony is admissible as proving that the Administrator applied an illegal criterion to all

applications for municipal power plants and therefore as proving that he applied an illegal criterion to the Greenwood County application. In the first place, as we have demonstrated in other portions of this argument, there is no legal distinction between the alleged existence of an extra-statutory criterion used in passing upon applications for power projects and the alleged existence of an ulterior motive in the mind of the Administrator. That an ulterior motive on the part of a public officer in doing an act which he has a legal right to do cannot invalidate that act is settled by the case of *Isbrandtsen-Moller Co. v. U. S., supra,* and authorities referred to therein. The existence of a motive or criterion being immaterial, evidence going only to show such existence is irrelevant.

Petitioners offer this evidence to prove not only the *existence* of an extra-statutory criterion but also the *application* of that criterion in the transactions between the Administrator and Greenwood County. They are saying that the testimony of these witnesses proves the application by the Public Works Administration of the alleged extra-statutory criterion in connection with some loans and grants, and that therefore it is proof of the application of the same criterion in regard to the Greenwood County loan and grant. This they contend although the record clearly shows that no criterion other than that prescribed by the statute was used in the approval of the Greenwood County application.

We think that petitioners' error as to the admissibility of this evidence lies in the fact that they do not realize that what they are trying to get from this evidence is proof of the actual doing of an act; *i. e.*, the applying of a non-statutory criterion. There is a very great difference in the law between proving what intent accompanied an act, admittedly done, by evidence as to the intent in the doing of similar acts, and in showing the commission of the act it-

self by such evidence. The requirements of similarity for the latter are much more exacting.

Dean Wigmore in his standard work on Evidence (2d Ed.), clearly states this proposition, Vol. I, page 617, § 304:

> When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's design or plan to do it. This in turn may be evidenced by conduct of sundry sorts as well as by direct assertions of the design. But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than the mere similarity, which suffices for evidencing intent. The object here is not merely to negative an innocent intent at the time of the act charged, but to prove a pre-existing design, system, plan or scheme, directed forwards to the doing of that act. In the former case (of intent) the attempt is merely to negative the innocent state of mind at the time of the act charged; in the present case the effort is to establish a definite prior design or system which included the act charged as a part of its consummation. In the former case, the result is to give a complexion to a conceded act, and ends with that; in the present case the result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed.
>
> The element, then, must be not merely a similarity in results, *but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*

The testimony which the petitioners introduced all dealt with conferences and communications between representatives of the Public Works Administration and representatives of power companies which were protesting the making of grants to communities which they seryed. If such conferences or communications had taken place in regard to the Greenwood grant the petitioners must necessarily have been parties thereto. Petitioners have offered no evi-

dence as to negotiations between themselves and the Public Works Administration even resembling the conferences and communications testified to by the representatives of other power companies. This in itself, we submit, shows such an obvious dissimilarity between the handling of the Greenwood County application and the handling of the other applications as to make the testimony inadmissible.

Furthermore, the instances which petitioners cite are too limited in number and unconnected to have probative value even as to the existence of any plan or scheme or use of any criterion in the Public Works Administration, much less as to its exercise in the approval of the Greenwood County application. The testimony deals with negotiations between the Public Works Administration and only four representatives of power companies. The PWA had handled several hundred applications for power projects and a reasonable percentage of these have been approved. Yet with a special sample of a few handpicked cases the petitioners seek to establish a general design or plan of such fixity and purposefulness as to evidence the doing of an act in the Greenwood County case where there is no scintilla of evidence to show that such act was done. Mr. Wigmore on this point says (page 336, § 102):

> The probative value of such a design or plan, for the purpose of admissibility, will depend chiefly on two elements, either of which may be very weak in a given instance—the fixedness or absolute quality of the design, in its subjection to no contingencies or conditions, and the specific direction of it to the act in question, *i. e.*, application not merely to a class of acts indefinitely foreseen, but to the exact deed in question.

We submit that the testimony introduced by the petitioners fails absolutely to meet this test and is therefore inadmissible.

B. The Testimony is Repugnant to the Hearsay Rule

The testimony of the witnesses, Post, Vennard, Byerley and Carter and the exhibits relative thereto were objected to as hearsay but the evidence was admitted by the District Court on the ground that the declarations, letters and telegrams were statements against the interest of the Administrator and therefore were not subject to the operation of the hearsay rule.

Although the rules regarding admissions or statements against interest had their origin as an exception to the hearsay rule, they have become so broad and diversified that they are now usually treated as a part of the substantive law of evidence, particularly where the person making the statement is a party to the suit in which it is sought to be introduced.

The theory is that where a person has made an admission or a statement which is against his interest at that time or against an interest which subsequently develops and is being maintained in court, that admission or statement is admissible, not to impeach his testimony, but to contradict his position. Now, since the statement is made outside of court, not under oath or subject to cross examination, it is obvious that it must either be made by the person against whom it is being introduced, or, if made by his agent, it must be shown independently that it was made while that agent was engaged in some transaction on behalf of his principal and acting within the scope of his express or implied authority. We submit that this had not been done in regard to the testimony introduced by the petitioners.

The evidence objected to involved only transactions with the Electric Power Board of Review, and, unless that Board was acting within the scope of its authority from the Administrator, nothing that it did is admissible against the Administrator. It should be pointed out that this case involves no rights of a third party who has relied to his

detriment upon the declarations or acts of members of the Board. The petitioners here are strangers to the transactions as to which they seek to introduce testimony. The petitioners did not rely on any of the acts or declarations of the members of the Board by which they now seek to bind the Administrator. The petitioners introduce this testimony as to acts and declarations of members of the Board and contend that they are acts and declarations of the Administrator merely to show that the Administrator did certain acts, thought certain thoughts, or had certain policies; and we submit that the petitioners must first show, by evidence other than the declarations of members of the Board, that the Board members were acting within the scope of their actual or implied authority during these transactions. This the petitioners have failed to do, and, from the very nature of the agency, are unable to do.

That the authority of the Electric Power Board of Review was definitely limited to reviewing disapprovals of power applications and making recommendations to the Administrator in regard to applications is clearly established by the order of the Administrator establishing the Board (Plaintiffs' Exhibit 46, R. 574). The order did not give the Board authority, either express or implied, to negotiate with the power companies for the lowering of their rates, or to indicate to the power companies upon what conditions the applications would be approved or disapproved, or to make any declarations or announcements as to the policies of the Administrator. We submit that this testimony as to declarations of the Board members while engaged in unauthorized acts is inadmissible against the Administrator.

In *Northwestern Union Packet Company v. Clough*, 20 Wall., 528, this Court said:

> Declarations of an agent are, doubtless, in some cases, admissible against his principal, but only so

far as he had authority to make them, and the authority to make them is not necessarily to be inferred from power to do certain acts.

The petitioners being strangers to the transaction have no standing to put forward the doctrine of apparent authority because, so far as the petitioners are concerned, the Board had no apparent authority while dealing with others and the petitioners cannot claim the position of one who has relied to his detriment upon the declarations and apparent authority of an agent.

Richmond Guano Co. v. Dupont, etc., Co. (C. C. A., 4th), 284 Fed., 803.

Maloney Tank Mfg. Co. v. Mid-Continent Oil Corp. (C. C. A., 10th), 49 F. (2d), 146.

There is complete failure on the part of the petitioners to show any ratification of the acts and declarations of members of the Electric Power Board of Review testified to by petitioners' witnesses. The evidence shows that when the unauthorized acts of the members of the Board came to the Administrator's attention he reprimanded Mr. Hunt, the Chairman of the Board, in writing (Defendants' Exhibit 79, R. 714), and ordered the Board to confine itself to the duties for which it had been established. This, in itself, would refute any argument of ratification, since it shows that as soon as the knowledge which would be necessary for ratification came to the Administrator he expressly refused to ratify their acts. The testimony shows further (R. 713) that the Administrator subsequently abolished the Board because he felt that its members had taken to themselves powers which he had not intended for them to have.

The testimony of the Administrator and others shows that the use of the words, "For the Administrator" did not mean that the Administrator had authorized the writing of the letters to which they were appended. That was merely a form of signature used throughout the office

and appeared on most of the letters written by PWA employees (R. 671).

Another independent consideration which shows the incompetency of the evidence objected to is that the petitioners' witnesses did not testify as to actions of the Board but rather as to statements and representations of the individual members of the Board. They do not testify as to what the Board *did* in regard to the various applications, but as to what Mr. Hunt or Mr. Rau *said* in regard to the applications. It is fundamental that when a Board has been given authority by a superior to act as a Board, it must act in that capacity if it is to exercise the granted authority. No effort was made to introduce any evidence of the action of the Board regarding any of these municipal applications.

VIII.

Procedure Adopted by the District Court After the Remand was Proper.

Petitioners argue that the District Court should have limited the scope of the retrial to such changes in the case as might have intervened since the entry of the original decree. Whether or not the District Court was right in refusing to so limit the hearing before it, depends altogether upon the interpretation of the order of remand made by this Court on December 14, 1936 (81 L. Ed., 149). We believe that the interpretation placed on this order by the District Court was correct but we shall not attempt to argue to this Court the effect of its own order.

It is our position that the record, even eliminating all the evidence taken since the original hearing, establishes our right to prevail against the contentions of the petitioners. However, we do feel it our duty to point out that when petitioners state on page 54 and on pages 87, *et seq.*, of their brief, that the motion, pursuant to which the Circuit Court of Appeals originally remanded the cause to

the District Court, contained allegations untrue in fact, that they are in error.

The December 8, 1934, contract contained a provision (R. 81, 83):

> 23. Conditions Precedent to the Government's Obligations. The Government shall be under no obligation to pay for any of the Bonds or to make any Grant:
>
> • • •
>
> (i) Rate Resolution and Bond Resolution. If the Borrower shall not have adopted a resolution satisfactory in form and substance to the Administrator, providing for rates to be charged for services afforded by the hydro-electric system, and shall not have adopted a resolution satisfactory in form and substance to the Administrator, authorizing the issuance of the Bonds.

The Revenue Bond Act of South Carolina (1933 Acts 299, XXXVIII Stat., 411, 418; Appendix to Government's Brief, page 56) provided:

> 21. Rates for Service.—Rates for services furnished by any such system or combined system shall be fixed precedent to the issuance of the bonds. Such rates shall be sufficient to provide for the payment of the interest upon and the principal of all such bonds as and when the same become due and payable, to create a Bond and Interest Redemption Fund therefor, to provide for the payment of the expenses of administration and operation and such expenses for maintenance of the system or combined system necessary to preserve the same in good repair and working order, to build up a reserve for depreciation of the existing system, project or combined system, and to build up a reserve for improvements, betterments and extensions of the existing system, project or combined system, other than those necessary to maintain the same in good repair and working order as hereinbefore in this Section provided. *Such rates shall be fixed and revised from time to time so as to produce these amounts,* and the governing body shall covenant and agree in the ordinance authorizing the issuance of

such bonds, and on the face of each bond *at all times to maintain such rates for services furnished by such system,* project or combined system *as shall be sufficient to provide for the foregoing.* (Italics supplied.)

Judge Watkins, in passing upon this provision of the contract (R. 122) found:

> 7. The rates for the sale of power to be produced by said Buzzard Roost project were fixed by Greenwood County, subject to the approval of the Administrator, under the terms of the loan and grant agreement entered into December 8, 1934, providing that, as a condition of the loan and grant, the County should adopt a resolution satisfactory in form and substance to the Administrator providing for rates to be charged for services afforded by the hydro-electric system.

And again in his opinion of August 10, 1935 (R. 477, 480):

> It (the December 8th contract) also requires the fixing of rates agreeable to the Administrator. Strictly speaking supervision may consist in directing either what shall or shall not be done.

The South Carolina Revenue Bond Act, in the quoted provision, required the issuing municipality to reserve the right to revise rates. In our opinion, and in the opinion of Secretary Ickes (R. 650), the contract of December 8, 1934, in the quoted provision, referred only to the initial rate resolution, and did not violate the terms of the State Act. Judge Watkins' language, however, while not entirely clear, is open to the interpretation (81 F. (2d), 986, 989, R. 874), that he found the language of the contract to mean that the Administrator would have the right to supervise the rates after the original rate resolution. The contract so construed, we submit, would violate the provisions of the South Carolina Act; and while Judge Watkins did not say in express language that it violated the South Carolina Act, his findings certainly support the position taken in the motion for remand (R. 493) as quoted in the opinion of the Supreme Court (81 L. Ed., 150).

The argument is made in the petitioners' Brief (page 54) that Judge Watkins, in passing upon the contract of December 8, 1934, held that it violated Federal, not State, law because Judge Watkins' decision said that all State questions had been settled by *Park v. Greenwood,* 174 S. C., 35. However, the *Park decision* was rendered by the South Carolina Supreme Court on October 31, 1934, and the contract to which reference is made was not entered into until December 8, 1934. The South Carolina Supreme Court could not, therefore, have passed upon the question of whether this contract complied with State law.

CONCLUSION

We submit for the reasons above stated that the decree of the Circuit Court of Appeals should be affirmed and petitioners' bill dismissed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY, PETITIONERS

v.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW, AND E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT ADMINISTRATOR

OPINIONS BELOW

The opinions of the District Court on the first hearing (R. 117, 477) are reported at 10 F. Supp. 854, and 12 F. Supp. 70. The order of the Circuit Court of Appeals remanding the cause is found at R. 515, 517. The opinion of the District Court at the conclusion of the second hearing is found at R. 518. The first opinion of the Circuit Court of

Appeals is reported at 81 F. (2d) 986. The opinion of the District Court on the third hearing, following the order of this Court, 299 U. S. 259, is found at R. 744, and its findings of fact and conclusions of law at R. 779–790, 791–799. The opinion of the Circuit Court of Appeals (R. 848) is reported at 91 F. (2d) 665.

JURISDICTION

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTIONS PRESENTED

1. Whether petitioner, as holder of a non-exclusive franchise for the generation and distribution of electric power, has standing to enjoin the respondent Administrator from making a loan and grant to the County of Greenwood, South Carolina, the proceeds of which are to be used in the construction by the County of a hydroelectric project, the construction and operation of which is a lawful undertaking of the County.

2. If the first question is answered in the affirmative, then whether the loan and grant agreement between the County and the United States is authorized by Title II of the National Industrial Recovery Act; and whether the statute is a valid exercise of Congressional power.

3. Whether the court below erred in construing the mandate of this Court as authorizing a full new hearing in the District Court.

STATUTES INVOLVED

These will be found in the Appendix, separately printed.

STATEMENT

This suit was brought by petitioner, Duke Power Company, against the County of Greenwood, South Carolina, and the members of its Finance Board, to enjoin the construction by the County of a hydroelectric generating and distribution system with funds to be advanced as a loan and grant by the respondent Administrator pursuant to Title II of the National Industrial Recovery Act. The respondent Administrator was made a party defendant on his own application (R. 65). The statement of the case will describe, in order, (1) the statute and the Public Works Administration, (2) the proposed project, the loan and grant agreement, and the revenue bonds of the county, and (3) the proceedings in the courts below.

1. THE STATUTE AND THE PUBLIC WORKS ADMINISTRATION

Section 201 (a) of Title II of the National Industrial Recovery Act, approved June 16, 1933, c. 90, 48 Stat. 195, authorized the President, in order to effectuate the purposes of that Title, to create a Federal Emergency Administration of Public Works, all the powers of which should be exercised by a Federal Emergency Administrator of Public Works. Pursuant thereto the respond-

ent Harold L. Ickes was appointed Administrator by Executive Order No. 6198, dated July 8, 1933.[1] As set forth in Section 203 (a), the purpose of Title II was to increase employment quickly by means of the construction, and financial aid in the construction, of various types of public works.

Section 202 of the Act required the Administrator, under the direction of the President, to prepare a comprehensive program of public works, which should include, among other things, certain enumerated classes of projects. These may be described, in abbreviated form, as follows: (a) construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control (with the proviso that river and harbor improvements must have been adopted by Congress or recommended by the Chief of Engineers of the Army); (c) any projects of the character heretofore constructed or carried on by public authority or with public aid to serve the interests of the general public; (d)

[1] Executive Order No. 6252, dated Aug. 19, 1933, delegated to the Administrator certain functions and powers of the President under Title II of the Act. See Appendix, pp. 44–47.

construction or repair under public regulation or control of local housing and slum-clearance projects; (e) any other project of a character theretofore eligible for loans under subsection (a) of Section 201 of the Emergency Relief and Construction Act of 1932.

Section 203 of the Act authorized the President, through the Administrator, with a view to increasing employment quickly while reasonably securing any loans made by the United States, to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to Section 202; and to make grants to states, municipalities, or other public bodies for the construction, repair, or improvement of any such project, in an amount not exceeding 30 per cent of the cost of the labor and materials employed upon such project.

The public works thus authorized are of two major classes, which have been kept distinct in the administration of the Act: (1) Federal projects, that is, those undertaken and constructed by agencies of the Federal Government, and (2) non-Federal projects, that is, projects undertaken, constructed, and to be carried on by non-federal agencies. Non-federal projects include (a) those undertaken and constructed by states or their subdivisions, and (b) those undertaken and constructed by private agencies, such as railroads. The questions presented in the present case, as in Nos. 84 and 85, relate solely to financial aid,

through loans and grants, to states and their subdivisions.[2]

Applications for loans and grants to states and subdivisions were examined in the first instance by the field organization of the Public Works Administration, and were submitted thereupon to the central organization in Washington.[3] The Administration, in addition, examined at the outset 526 projects turned over to it by the Reconstruction Finance Corporation, pursuant to Section 301 of the Act. These and the other applications of states and subdivisions were submitted to the several

[2] This classification of projects has been consistently followed by the Public Works Administration, as indicated by its official reports to Congress. See *Report of the Business of the Federal Emergency Administrator of Public Works for the Period Ending Feb. 15, 1934*, Senate Document 167, 73rd Cong., 2nd Sess., transmitted pursuant to Senate Resolution No. 190 (301 pages) (Def. Ex. 70); *Pending Non-Federal P. W. A. Projects*, Sen. Doc. 183, 74th Cong., 2nd Sess., March 9, 1936, transmitted in response to Senate Resolution No. 234 (132 pages); *Public Works Administration Allotments for Gas and Electric Projects*, Sen. Doc. 184, 74th Cong., 2nd Sess., March 9, 1936, transmitted pursuant to Senate Resolution No. 235 (19 pages); *Non-Federal Public Works Administration Projects*, Sen. Doc. 193, 74th Cong., 2nd Sess., April 4, 1936, transmitted pursuant to Senate Resolution 271 (115 pages). See also Testimony of the Administrator during the Hearings on the First Deficiency Appropriation Bill, 1936, May 18, 1936, before the Subcommittee of the Committee on Appropriations, U. S. Senate, 74th Cong., 2nd Sess.

[3] The outline of procedure which follows is based, unless otherwise noted, upon the Report of March 26, 1934, Senate Doc. 167, 73rd Cong., 2nd Sess., pp. 1–8, cited in Note 2, *supra* (Def. Ex. 70).

divisions of the Public Works Administration for the preparation of advisory technical reports for the information of the Administrator: the soundness of the project from an engineering standpoint was examined by the engineering division; the adequacy of the security, where a loan was requested, was examined by the financial division; and the authority of the applicant to undertake the project and issue its obligations therefor was examined by the legal division. These advisory reports were submitted to the Administrator and to a Special Board for Public Works appointed by Executive Order No. 6174, dated June 16, 1933, consisting of the Secretary of the Interior, Chairman; the Secretary of War; the Attorney General; the Secretary of Agriculture; the Secretary of Commerce; the Secretary of Labor; the Director of the Budget; and two additional members (Appendix, p. 42). Where the Administrator and the special board recommended the inclusion of the project in the comprehensive program of public works, and the making of a loan and grant therefor, such recommendation was submitted to the President for his approval or rejection. Following approval by the President an agreement was entered into with the applicant for the making of the loan or grant or both, as the case might be. Where loans were made, a uniform rate of interest of 4 per cent was prescribed. See Circular No. 1, pp. 9, 12 (Pl. Ex. 36, separately certified). The form of security

offered by the applicant varied with the type of project and the applicable state law; eligible security included general obligation bonds supported by the taxing power of the state, bonds payable out of earnings of the project, i. e., revenue bonds, special assessment bonds, and other types of municipal bonds. See *id.*, at p. 13. Where grants were made, they were uniformly in the amount of 30 per cent of the cost of labor and materials employed upon the project.

As of the date of the last trial in the District Court in February 1937, 9389 non-Federal projects of many different types and extending into every county in the United States except three had been approved by the Public Works Administration and funds aggregating $1,480,612,543 allocated therefor. Of this number 282 are electric power projects, 92 of which are located in places where privately owned electrical facilities are now operated—190, or more than two-thirds, being noncompetitive. The 92 allocations for competitive power projects total $27,339,947, representing less than one percent of the total allotments in number and two percent in amount. In addition thereto $54,000,000 had been allotted for several large water projects, which include power generating facilities along with other features, such as irrigation, flood control, and navigation (Fdg. XV, R. 786–787; R. 676).

The authority to make loans and grants was to terminate, according to Section 201 (d) of the Act,

two years after the enactment of the Act, or sooner if the President or the Congress should declare that the emergency had ended. It was provided, however, that funds might be issued to a borrower under the provisions of the Act at any time prior to January 23, 1939, pursuant to any agreement or commitment to bid upon or purchase bonds which had been entered into with a borrower prior to the date of termination of the power to make loans under the Act. The Emergency Relief Appropriation Act of 1935, Chap. 48, 49 Stat. 115, 119, enacted April 8, 1935, provided in Section 12 that the Federal Emergency Administration of Public Works was continued until June 30, 1937, made available until June 30, 1937, all sums appropriated to carry out the purposes of Title II of the Recovery Act, and authorized said Administration to perform such of its functions under Title II as might be authorized by the President. Pursuant to this section the Public Works Administration was authorized, by Executive Order No. 7064, June 7, 1935 (Appendix, p. 48), to continue after June 16, 1935, to perform all the functions which it was authorized to perform prior to June 16, 1935, under Title II of the Recovery Act. The First Deficiency Appropriation Act, fiscal year 1936, enacted June 22, 1936 (49 Stat. 1597, 1608, Appendix, p. 37), provided in Title II that, subject to certain restrictions, the Administrator might make grants to aid in the financing of public

works projects of the kind and character for which he had theretofore made loans or grants pursuant to Title II of the Recovery Act or the Emergency Relief Appropriation Act of 1935. The Public Works Administration Extension Act of 1937 extended to July 1, 1939, the provisions of law relating to the availability of funds for carrying out the functions of the Administration (Appendix, p. 39).

While Title II of the Recovery Act furnishes a complete basis for the proposed loan and grant in the present case, the subsequent acts are of importance in confirming the authority to make loans and grants for power projects, and for the Greenwood County project specifically, and those acts are therefore relevant in connection with the questions of statutory authority and delegation of power. (See Government's brief in Nos. 84 and 85, pp. 104–118).

2. THE PROJECT, THE LOAN AND GRANT AGREEMENT, AND THE REVENUE BONDS OF THE COUNTY

On its own initiative Greenwood County filed an application on November 16, 1933, with the local agency of the Public Works Administration for a loan and grant in the amount of $2,627,197 to finance the construction of a hydroelectric plant and distribution system at Buzzard's Roost on the Saluda River in South Carolina (R. 267, 687, 694). Authority to issue revenue bonds for a project of that type, as well as for a great variety of other

enterprises, had been conferred upon counties and other political subdivisions by a statute of South Carolina enacted May 8, 1933, prior to the enactment of Title II of the Recovery Act. South Carolina Act 299, 1933, subsequently amended (Appendix, pp. 56, 75).

Seven months after the application of the County was filed it was approved by resolution of the Administrator and Special Board for Public Works on June 20, 1934, and was included in the comprehensive program of public works (R. 369). Presidential approval followed (*Ibid*). Because, however, of a protest filed by the Duke Power Company, requesting a hearing on the proposed loan and grant, the approval was suspended (R. 463), and the company was granted a hearing on July 2, 1934, before the Electric Power Board of Review (Def. Ex. 57, separately certified). The grounds of the company's objection to the project were stated to be "that the proposed project will not be self-liquidating, will be uneconomical, will not be in the public interest, but will be detrimental to enterprises which are already adequately serving the territory in question" (Def. Ex. 57, p. 2). On November 7, 1934, the Administrator and Special Board for Public Works again resolved that the project be approved and that an allotment in the amount of $2,852,000 be made therefor, and on November 8, 1934, Presidential approval was given (R. 368–369).

The project involves the construction of a dam, power plant and distribution facilities intended to serve three counties in South Carolina (R. 267). Approval of the project has been given by the Federal Power Commission, which assumed jurisdiction upon the application of the County on the ground that, while the Saluda River is not a navigable waterway, the construction of the project affects navigation on navigable streams (R. 400–405). The plans for the project have also been approved, so far as they affect the navigable capacity of navigable waters of the United States, by the Acting Secretary of War and the Acting Chief of Engineers of the Army (R. 406).

The application of the County filed with the Federal Power Commission indicated that several of the petitioner's customers have agreed to purchase power from the County's plant. These customers purchased from petitioner approximately 12,000,000 kilowatt hours of electric power per year (R. 340), or less than one-half of one per cent of the total sales by petitioner in the Piedmont section of the Carolinas of 2,476,000,000 kilowatt-hours in the year 1936. The increase in the sales of petitioner in 1936 over 1935 was more than 380,000,000 kilowatt-hours. The loss of 12,000,000 kilowatt-hours to Greenwood County will amount to approximately three per cent of petitioner's annual increase in sales (Fdg. 21, R. 789). In addition, the County listed as prospective customers consumers

who purchased power from petitioner in 1934 in the amount of 35,473,943 kilowatt hours (R. 341). The Duke Power Company furnishes only a small part of the power consumed in Greenwood County (R. 182).

The first agreement between the county and the United States for the making of the loan and grant was executed on December 8, 1934 (R. 73–94), more than a year after the application of the county had been filed. This agreement was superseded by the existing agreement of November 30, 1935 (R. 494–514). The material differences in the two will be noted *infra*, pp. 22–23. The existing agreement provides for the purchase by the United States of revenue bonds of the county in the aggregate amount of $2,219,000, bearing 4 per cent interest per annum, and maturing serially from 1936 to 1960. The agreement provides, further, for the making of a grant in an amount equal to 30 per cent of the cost of labor and materials employed on the project, but not to exceed in any event the sum of $682,000 (R. 495). The detailed provisions of the agreement may be grouped under two heads: (1) those relating to the security of the loan, such as the continued responsibility of the borrower and its ability to complete the project, the filing of plans and specifications, the furnishing of information concerning the progress of the work, and the carrying of insurance on the project (R. 495–499); (2) conditions precedent to the making

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of the loan and grant relating to the inclusion, in contracts made by the county for the construction of the plant, of provisions regarding wages and conditions of employment in such construction, as required by Section 206 of the statute (R. 499–501). The agreement contains no provision giving the Administrator any rights with respect to the operation or use of the plant. With respect to rates, the agreement provides that the Administrator and the Government shall have no rights or power except (so long as they hold any of the bonds) such rights as any holder of the County's bonds would have under the laws and constitution of South Carolina and the proceedings of the applicant taken pursuant thereto in authorizing the issuance of the bonds (R. 501).

The bonds are revenue bonds, so-called because they are payable from the revenues of the system constructed with the proceeds of their sale. Such bonds have been issued and sold by political subdivisions for decades and in substantial amounts. Cf. *Puget Sound Power & Light Co.* v. *Seattle*, 291 U. S. 619, 631; and "Revenue Bond Financing By Political Subdivisions,"[4] showing in detail that millions of dollars of such bonds have been purchased by investors, including institutional investors, and at prices and terms equal to or better than general obligation bonds payable out of taxes. The earnings from the project are segregated and the

[4] Prepared by the Public Works Administration (U. S. Govt. Printing Office, 1936).

security of the loan cannot therefore be impaired by wasteful borrowing on the part of the municipality through the issuance of general obligation bonds payable out of the city's general revenues.

Petitioner's suggestion that, because of the nature of revenue bonds, the ability of the county to compete with petitioner is greater than if the bonds were general obligation bonds is, of course, unjustified. If the bonds were payable out of the county's taxes, it could fix its rates as low as it wished and without regard to the effect on the earnings of the project, whereas its obligations under the revenue bonds, by virtue of the South Carolina statute and the terms of the bonds, require it not to fix rates so low as to impair the earnings of the project, which are pledged to secure the bonds.

The issuance of the bonds was authorized by resolution of the Finance Board of Greenwood County (R. 20–33, 102–109) acting under authority of Act 299, Acts of South Carolina, 1933, as amended, and Act 1095, Acts of South Carolina, 1934 (Appendix, pp. 56, 75). The County is required by these statutes to fix rates sufficient to provide for the payment of the interest upon and principal of all bonds issued to finance the construction of the Buzzard's Roost project as and when the same become due and payable; to create a Bond and Interest Redemption Fund therefor; to provide for the payment of the expenses of administration and operation and such

expenses for the maintenance of the project as are necessary to preserve the same in good repair and working order; to build up a reserve for depreciation of the project and to build up a reserve for improvements, betterments, and extensions to the project other than those necessary to maintain the same in good repair and working order. The County is also required to revise such rates from time to time in order to provide for the above items (Section 21, Act 299, 1933, Appendix, p. 67).

The statute gives to the bondholders what is called a "statutory lien" on the project. Such lien amounts merely to the statutory right to bring mandamus or other proceedings in an appropriate court to secure performance of the obligations imposed upon the County by the Statute (Sections 8, 9, Appendix, pp. 62–63). The statute also provides that if there be any default in the payment of the principal of or interest upon any of the bonds, any court having jurisdiction in any proper action may appoint a receiver to administer and operate the project on behalf of the County with power to fix and charge rates and collect revenues sufficient to provide for the payment of any bonds or other obligations outstanding against the project and for the payment of the expenses of operating and maintaining the same, and to apply the income and revenues of the project in conformity with the statute and the resolution providing for the issuance of such bonds (Section 10, Appendix, p. 63).

There is no right in the bondholders to foreclose on the property of the County, including the project, or to require its sale or themselves to take it over and operate it. It should be noted that the above provisions of the statute, as well as the resolution of the County authorizing the issuance of the bonds (Section 10, Appendix, p. 63), provide only for the appointment of a receiver to operate and administer the project "on behalf of the borrower," *i. e.*, the County, in accordance with the provisions of the statute which apply to the operation of the project by the County itself. The appointment of a receiver thus merely provides the bondholders with an equitable method of obtaining specific performance of the statutory obligations of the County.

The rights of a bondholder with respect to the fixing and charging of rates, simply stated, come to this. He may compel the County through appropriate court action to comply with the statutes of the State of South Carolina which set out specifically how the County shall fix its rates. In other words he has only the statutory right to invoke the aid of the courts to compel the County to abide by the law of the State of South Carolina regulating the rates the County is required to charge.

The District Court found (R. 782)—and the evidence is uncontradicted on that point—that, without consulting with the Public Works Administration, the County prepared and included in its orig-

inal application for a loan and grant, a schedule of rates for the sale of electrical energy to various classes of customers. This schedule, prepared by the County's own technical advisers, was incorporated, without alteration, in the bond resolution adopted by the County on October 6, 1934, prior to the making of any loan and grant agreement (R. 6, 20–33, 730). The original loan and grant agreement, subsequently executed on December 8, 1934, provided that the United States should not be obliged to pay the County any portion of the loan unless the County should "adopt a resolution, satisfactory in form and substance to the Administrator, providing for rates to be charged for services afforded by the hydro-electric system" (R. 83).

Under the South Carolina statute, the County is required from time to time to adjust its rates. After the new loan and grant agreement had been executed, the County, again of its own motion and without any consultation with or suggestions from the Public Works Administration, reexamined its prior rate resolution and, on December 2, 1935, adopted a new rate resolution in which it fixed the same rates (R. 730–734). It is not disputed that the County's rates comply with the requirements of the South Carolina statute and are sufficient to provide for the repayment of the proposed loan.

One of the reasons for the execution of the superseding and existing agreement of November 30, 1935, was to remove all foundation for the infer-

ence, which respondents believed contrary to the fact but which was made by Judge Watkins, that the provision of the original agreement with respect to the County's rate resolution was intended to give the Administrator either a continuing control of the rates to be charged by the County or the right to approve or disapprove the rate schedule of the County on a basis other than the interest of the Government as a prospective holder of bonds. (We do not mean to concede that such a provision would have been invalid; the question is not here involved. See Government's Brief in Nos. 84 and 85, p. 171, note 80.)

The original agreement also contained other conditions with respect to rates (Section 23 (k) and Section 24; R. 83). Both of these sections provided for a minimum and not a maximum rate. Section 23 (k) conditioned the making of payments by the United States to the County upon either—

(1) the borrower's obtaining contracts with consumers for the sale of at least 25,000,000 kwh per year of firm power at a rate of *not less* than 7.6 mills per kwh and for approximately 5,000,000 kwh per year of secondary power at approximately 5 mills per kwh; *or*

(2) submission of "evidence, satisfactory to the Administrator that the borrower will sell a sufficient amount of kw hours as will, in the opinion of the Administrator, produce the equivalent total revenues" (R. 83).

The County did make tentative contracts for the sale of about one-half of its power to certain customers of petitioner. But those contracts were entered into prior to the execution of the first agreement with the United States (R. 371–398). None of those contracts was approved by the Administrator (R. 665). The present agreement between the United States and the County has no provision with respect to any such contracts.

The validity of the bonds and of their issuance to the United States was upheld in all respects under the law of South Carolina by the Supreme Court of that state in *Park* v. *Greenwood County,* 174 S. C. 35. The court rejected the contention that the bonds violated constitutional and statutory limitations on the incurring of indebtedness by a County. And in *Clarke* v. *South Carolina Pub. Serv. Authority,* 177 S. C. 421, the court sustained, under South Carolina law, a loan and grant agreement similar to that here involved.

3. PROCEEDINGS IN THE COURTS BELOW

The present suit was brought on November 7, 1934, in the District Court for the Western District of South Carolina. The bill (R. 2–20) attacked the proposed undertaking of the County as being in violation of the laws of South Carolina, alleged that the Federal statute did not authorize the loan and grant, and that the statute was unconstitutional, and prayed for injunctive relief against the County's undertaking. After answers were filed,

that of the Administrator setting out in an exhibit a contract of December 8, 1934, comprising the then existing loan and grant agreement with the county (R. 73–94), the bill was amended and supplemented (R. 109–115) to seek relief against the Administrator. Motions to dismiss the amended bill were made by the defendants (R. 115–116). The District Court rendered an opinion containing findings of fact based upon the allegations of the bill, and conclusions of law (R. 117–152), and overruled the motions (R. 152–153).

Subsequently, answers to the amended bill were filed (R. 153–156). The District Court referred the case to a Master for the taking of evidence, which related largely to the question whether the cost of constructing the project would exceed the amount of the loan and grant and whether the project would be self-liquidating. The Master reported the evidence to the court without any findings or conclusions. Thereafter the District Court rendered an opinion (R. 477–483) adopting the findings of fact which it had theretofore made upon the basis of the pleadings, except that upon the evidence introduced the court found that there was substantial evidence to support the Administrator's determination that the project would be self-liquidating. The court held that petitioner was entitled to attack the proposed loan and grant by reason of its status as a Federal and local taxpayer and franchise holder and that the proposed loan and grant was invalid. The court, accord-

ingly, entered an injunctive decree (R. 484–485), from which the respondents appealed.

In the Circuit Court of Appeals the respondent Administrator advised the Court of a superseding loan and grant agreement between the county and the United States, dated November 30, 1935, which had been executed subsequent to the taking of the appeal and which differed in material respects from the agreement of December 8, 1934 (R. 494–514; cf. R. 73–94); and prayed that the cause be remanded to the District Court with leave to the parties to amend their pleadings in accordance with the facts and for a trial or other disposition of the cause on such amended pleadings (R. 493). Similar new agreements were submitted to many other municipal borrowers (R. 644).

The new agreement was made in an effort to remove the features of the agreement to which objection had been made in this and other litigation (R. 644). All provisions of the agreement of December 8, 1934, relating to rates were eliminated,[5] and many of the provisions relating to supervision of the work of construction were eliminated or modified.[6] The agreement of November 30, 1935,

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[5] These were: Par. 23 (i), conditioning payment of the loan and grant upon the passage of a rate ordinance satisfactory to the Administrator, 23 (k), conditioning the loan and grant upon the making of contracts for the sale of power at not less than certain specified rates; and 24, fixing minimum rates for telephone lines (R. 82–83).

[6] Paragraphs 1, 3, 6, 10, 13, and 13 (a) of Part One, and all of Part Two, were altered; paragraphs 10 (a), 15, 18, 20, 22, 23 (c), 23 (e), 23 (f), 23 (g), 23 (h), of Part One were eliminated.

contains no terms or provisions with respect to rates to be charged by the county, except the following clause (R. 501):

> 12. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged for the services and facilities afforded by the Project, excepting only such rights as they may have as a holder of such Bonds under the laws and the Constitution of South Carolina and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

The Agreement further provides:

> 13. This Agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project.

The net effect of the new contract is that, once the project has been completed, the United States will have no relation to it whatever except the relation which it will occupy as an ordinary holder of the county's revenue bonds until they are sold. That many such have been so disposed of by the Public Works Administration, see the article cited *supra*, p. 14, note 4.

The Circuit Court of Appeals ordered the cause remanded to the District Court "to the end that that court may reconsider its decision in the light of the said contract and may take such further action as may be appropriate in the premises" (R. 517). Further proceedings were then had in the District Court, and on December 31, 1935, that court entered further findings of fact and conclusions of law (R. 518–527) which substantially adhered to the prior findings and conclusions, and ordered that the application to vacate the prior decree be denied (R. 527–528). The injunctive decree was made applicable to the new agreement (R. 526).

Respondents appealed to the Circuit Court of Appeals, which reversed the decree with directions that the bill be dismissed, 81 F. (2d) 986.

In a comprehensive opinion by Judge Parker, concurred in by Judge Northcott, Judge Soper dissenting, the court held that the statute authorizing the loan and grant is within the power of Congress to make appropriations for the general welfare; that the statute did not delegate legislative power; that the loan and grant agreement did not in its terms or its purpose invade a field reserved to the States; that the Administrator did not abuse his discretion in making the loan and grant; and that apart from the foregoing conclusions, petitioner was not in a position to seek injunctive relief against the loan and grant since

no right of petitioner's was invaded by the County in building the project or by the Administrator in making the loan and grant. 81 Fed. (2d) 986. Certiorari was granted on May 18, 1936.

On December 14, 1936, this Court reversed the decision of the Circuit Court of Appeals because of irregularities in procedure and ordered the cause remanded to the District Court "with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts, and that the cause be retried upon the issues thus presented" (299 U. S. 259). The opinion stated (p. 268), "We express no opinion on the relevancy or effect of the evidence, or otherwise upon the merits."

After the pleadings had been amended, the cause was retried before District Judge Glenn in February, 1937. All of the evidence previously in the record was re-introduced, and in addition, both parties introduced certain new evidence, practically all of it being of a cumulative nature. On June 1, 1937, the trial judge rendered an opinion favorable to the defendants (R. 744–778). Comprehensive findings of fact and conclusions of law were entered (R. 779–799), and a decree was filed dismissing the bill on the merits (R. 799–800).

The case was appealed by petitioner to the Circuit Court of Appeals and on August 6, 1937, that Court handed down its decision affirming the de-

cree of the trial court, except as to costs (R. 848–878). The court considered and concurred in the findings of the District Court, and reaffirmed with a full opinion its earlier conclusion that the statute and the action of the administrator were valid, and that petitioner had no standing to complain (R. 848). Certiorari was again granted on October 25, 1937.

ARGUMENT

I

INTRODUCTORY: SCOPE OF THE BRIEF

Since the questions presented in the instant case are in all essential respects the same as those discussed in the Government's brief in Nos. 84 and 85, it will not be necessary to repeat here the arguments there set forth. Reference thereto is respectfully made. This brief will be confined to a discussion of the evidence relating to the so-called policy or purpose of the Administrator; and to a discussion of certain contentions made by petitioner concerning (a) the relevance of the alleged improper policy or purpose of the Administrator; (b) the standing of the petitioner to challenge the validity of the proposed loan and grant; and (c) the propriety of the scope of the hearing in the District Court following this Court's vacation of the decree.

II

THE ALLEGED IMPROPER PURPOSE OF THE ADMINISTRATOR

The findings of the courts below

Virtually the only issue on which there was any dispute in the evidence was the question of the purpose or policy of the Administrator in making the loan and grant. As indicated at pages 64–70, *infra,* and at somewhat greater length in the Government's brief in Nos. 84 and 85, it is our position that the Administrator's purpose or policy in approving the loan and grant is irrelevant both as a matter of fact and as a matter of law.

But even if the Court should consider the policies or purposes of the Administrator relevant, petitioner is bound by the findings of the two courts below rejecting petitioner's allegations in the light of the evidence.

In this connection, the trial court found (R. 788):

> I find that the defendant, Harold L. Ickes, Federal Emergency Administrator of Public Works, in making this allotment of funds to Greenwood County and in entering into the contract with the county, had no purpose other than that set out in the Act of Congress and that the policy of the Public Works Administration is correctly set out in the Administrator's report to the United States Senate (73rd Congress, 2nd session, Senate Document 167; Defendants' Exhibit 70):

> "The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works, thereby increasing the consumption of goods and also providing employment in the capital goods industry."

And the Circuit Court of Appeals, in discussing this question, said (R. 866):

> The contention of the plaintiff is that the action of the Administrator in making such a loan and grant should be enjoined on the ground that, in making same, he is actuated by the motive of reducing power rates and that, in any event, the construction of the project made possible thereby will have that effect. There are several answers to this, each of which seems to us to be complete and final.
>
> In the first place, the court below has found, and the finding is supported by evidence, that the Administrator was not actuated by such motive in making the loan and grant to the county; that the Administrator will have no power to coerce or control the action of the county in the matter of rates; that any effect which the construction of the project will have on the rates will be the result of competition which the county will voluntarily enter into; and that on account of differences in cost, overhead, taxes, etc. the project will not provide a criterion for the fixing of rates of private enterprises. The contention of plaintiff,

> therefore as to the motive in the making of the loan and grant here involved must fail on the facts.

Under the established practice of the Court, such concurring findings will not be disturbed unless clear error is shown. *Bodkin* v. *Edwards*, 255 U. S. 221, 223. No contention is made by petitioner, nor could it be made, that the record is without substantial evidence to support the findings.

Indeed, it is doubtful whether petitioner, in view of its limited specification of errors, is in a position to raise any question with respect to the findings of fact. The petition (p. 11) states, after adopting by reference the assignments below, 34 in number, that "The errors assigned raise the questions set forth in the foregoing statement of questions presented," referring to pages 3 and 4 of the petition; at that point but five questions are set forth. The brief (p. 12) under the heading "Specification of Errors" states that the errors specified raise three principal questions, one stated with three subdivisions. Apart from the general reference to the assignments below, neither in the specification of errors in its brief nor in its statement of questions presented in its petition has petitioner assigned error concerning the findings of the District Court.

In the light of the foregoing, it is perhaps unnecessary to enter upon a review of the evidence. Nevertheless, in view of the fact that petitioner's

brief is largely devoted to a discussion of that subject, and in view of the nature of the allegations made, we shall turn to a consideration of the evidence in what is doubtless greater detail than the circumstances of the case require.

The testimony of the Administrator

There is ample evidence to sustain the findings of the two lower courts as to the purposes and policies of the Administrator.

The Administrator testified at the second trial before Judge Watkins, substantially as follows:

Neither the Administrator nor the United States has initiated or instigated or induced the making of applications for competitive power projects. That was true specifically in the case of Greenwood County. Where a loan to a city was based upon revenue bonds, the sole interest of the Administrator in the rates of a competing utility related to the question whether or not the rates to be charged by the city would enable it to repay the loan. Where loans were to be made on general obligation bonds (payable out of taxes), no consideration was given to the rates of the project.[7] If the people of the local community wanted to own their utilities and were able to finance them, they should not be denied that opportunity merely because the rates necessary to be charged were equal to or in excess of

[7] See *infra*, pp. 52–53 as to one exception; namely, where the city was in poor financial condition.

competitive rates. The Public Works Administration did not attempt to dictate on that subject (R. 646–648, 661).

The Administrator further testified that his sole interest in the rates of the County of Greenwood was that they should be large enough to give reasonable security for the investment of the United States. It was only because petitioner's rates might affect the County's earnings that he had any interest, as Administrator, in petitioner's rates. If petitioner reduced its rates below the cost of producing and supplying current, and the County had to meet those rates in order to hold its customers, it would have an indirect effect. The Administrator's interest in the County's rates was the same as any banker would have in buying its bonds. The loan and grant to Greenwood County would have been made "regardless of the rates, or our opinion of the rates, of the Duke Power Company, if Greenwood County had the legal authority to enter into the contract with us, and if Greenwood County could satisfy us that it could liquidate the loan that we made. Those were the considerations." (R. 642–643; 647; 667; cf. Fdg. 19, R. 788–789.)

"As to whether I am in favor of municipalities owning their own plants, my personal view is that it depends upon the situation. In my own village of Winnetka, Illinois, we have owned and operated our own plant for a good many years with entire sanction and approval, including that

of the greatest group of utility lawyers living near Chicago. Some communities are so badly administered, their politics are so corrupt, they cannot be trusted to own and operate their own utilities, and in other instances they can'' (R. 661–662).

The Administrator further testified that neither he nor the United States intended to exercise any control or influence of whatever kind over the rates to be charged by the County nor to control directly or indirectly the rates of petitioners.[8] Nor did the Administrator or the United States intend to engage in the operation directly or indirectly of the County's power project. In passing upon projects such as that of Greenwood County no considerations were weighed other than those involved in other types of applications. Of the total aggregate of non-federal projects, measured in money terms, competitive municipal power projects would probably not exceed approximately two per cent or less. The contracts which Greenwood County made for the sale of power to be produced by its project had never been presented to the Administrator, and he did not know whether they had been presented to anyone else in the Pub-

[8] The provision in the former contract of December 8, 1934 (not contained in the present contract), with respect to the adoption of a rate resolution by the County satisfactory to the Administrator, was intended to relate solely to the initial rates and he did not understand that it gave him a reservation of future power with respect to rates (R. 650, 666–667). See also, pp. 18–19, *supra*.

lic Works Administration.[9] (R. 647–648, 650, 657, 665).

The Administrator further testified that he had the same interest any banker would have in buying the bonds, and would not have entered into a contract with the county if the rates had not shown a sufficient prospective income based on those rates to liquidate the loan. "The rates as such were not approved by the PWA authorities. We knew that those rates were sufficient. If the rate were a lower rate applied to a larger sale of power which would have been sufficient in the aggregate to liquidate the obligation to the United States, that would have been a satisfactory arrangement. On the other hand, if it had been a higher rate, applied to a lesser amount of power sold, which would yield enough to liquidate the obligation of the United States, that would have been a satisfactory arrangement" (R. 665–666).

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[9] That testimony related to section 23 (k) of the old contract (not contained in the existing contract) to the effect that the Administrator was not obliged to pay any money to the County if it had not obtained contracts with consumers, satisfactory to the Administrator, providing for the sale of a stated amount of power at "not less than" a stated rate, or, in the alternative, if the county did not present evidence that it would sell a sufficient amount of power to produce the equivalent total revenues (R. 83). That provision did not (as petitioners intimate) have the effect of bringing about a reduction of rates, since it did not refer to maximum, but only to minimum rates, and to those only as one form of evidence regarding adequacy of revenues. See *supra*, p. 19.

The Administrator's Book

On cross-examination, petitioner's counsel read to the Administrator selected passages from his book, "Back to Work," published June 1935 (R. I. 653–664). After reading a selected passage from a given page, he would ask whether the book had so stated and would receive an affirmative answer. He would then turn to another selected passage on another page and do the same, thus tending to create the impression that the separated passages were related. Much of the "testimony" of the Administrator on cross-examination, referred to in petitioner's brief, is simply the product of that course of questioning.

To avoid the delay and confusion incident to bringing out, on redirect examination, a detailed explanation in each instance of the false picture of the book thus created, defendant's counsel offered the entire book, and it was admitted in evidence as defendant's Exhibit 85 (R. 667). It has been separately certified as part of the record (R. 667).

The book consists of 268 pages. Of those 268 pages, 2 chapters—5 and 6, pages 99 to 147—are devoted to the subject of power. The first of these two chapters and 14 pages of the second chapter (pp. 99 to the middle of p. 135) are devoted exclusively to federal power projects where the Federal Government is using its war power and interstate commerce power (*Arizona* v. *California,* 283 U. S. 423; *Ashwander* v. *Tennessee Valley Authority,*

297 U. S. 288). Petitioner's description of the book and the juxtaposition of excerpts from the discussion therein of federal power projects and excerpts from the few pages dealing with non-federal (state and municipal) projects tend to create so misleading an impression that we call attention to the following actual sequence of chapter six, from which petitioner has quoted: It begins (p. 122) with a discussion of the great potential value of unused falling water in the United States. Then follows (pp. 123–124) a discussion of a rate survey throughout the United States made by the Federal Power Commission. Reference is then made (pp. 124–125) to the establishment of a National Power Policy Committee established by order of the President, "for the 'purpose of developing a plan for the *closer cooperation of the several factors in electric power supply, both public and private,* whereby national policy in power matters may be unified and electricity be made more broadly available at cheaper rates to industry, to domestic and particularly to agricultural consumers; the committee is to be advisory to the President.'"

Then follows a discussion of federal power projects established by the Federal Government with the use of Public Works and other funds, with specific reference to federal dams at Boulder, Grand Coulee, Bonneville, and the Wilson and Norris dams, and a discussion (p. 126) of the benefits of

the cheaper power resulting from the sale of power generated at those dams. The eight pages following (pp. 126 to 134) are devoted to a discussion of the activities and benefits of the Tennessee Valley Authority. In this context (p. 135) the following statement is made: "This TVA enterprise has appealed particularly to the public imagination because of its magnitude and on account of the broad social concept that underlies it. Yet this is not the only front upon which the government, under its PWA program, has been advancing against those utility interests that have been exacting unconscionable tribute from the people of the United States for so many years." This is immediately followed by a discussion of another federal, a reclamation, project, the Casper Alcova, in Wyoming. Up to this point there is no discussion whatsoever of any nonfederal (i. e., State or municipal) projects, the discussion being confined to Federal projects built by the United States itself pursuant to its war powers, its power over commerce, and its power over public lands; including at least two projects—the Boulder and Wilson dams—whose validity has already been sustained by this Court.

Beginning at the bottom of page 135 there occurs, for the first time, a discussion of loans and grants to states and their subdivisions for rural electrification. On page 136 begins a discussion of loans and grants for municipal power projects. For two pages there is a discussion of the security

behind such loans and the standards required with respect thereto. On page 137 it is stated that the question of building such projects is left to the determination of the local community. On pages 137 to 140 it is stated that, in reaching that determination, the municipalities may well have in mind other considerations than cheap power, i. e., the elimination of the corrupting influence of certain utilities and their stock manipulations, with specific reference to the activities of an individual not involved in these cases.

It is obviously misleading to take a few sentences from the context of a discussion of specific abuses, or of Federal power projects, and to draw therefrom a generalization regarding the purpose of the Public Works Administration in making loans and grants for municipal projects. The process is doubly misleading unless the nature of the book itself is borne in mind.

The book was not an official report, but was written for popular reading; as the preface states, it treats the subject "in broad outline," in order to inform "the people, whose money it was," how the Public Works Administration had expended the funds under its control.

The book describes, as its title indicates, the increase in employment resulting from the public works program, both in connection with Federal and non-Federal projects. In addition, it discusses the incidental and collateral benefits, not only of the public works program but of the work

of other Federal agencies such as the Reclamation Service, the Bureau of Roads, and the Tennessee Valley Authority. In venturing into this more controversial field, the book joins issue on the question of popular justification for enacted legislation, and enters somewhat into the realm of polemics. While the book may not always differentiate with meticulous precision between the direct and indirect consequences of the activities of the Federal Government, it is submitted that more care is shown in this regard than is often found in the utterances of public officials surveying the accomplishments of the Government.

Thus on pages 146–147 of the book is the following passage:

> One of the most important accomplishments of PWA, *although an indirect one,* has been a saving to consumers of millions of dollars through the lowering of rates by the private utilities to meet the charges proposed by applicants for public power projects. The rejection or withdrawal of some of the 200 applications that PWA did not approve was the result of this reduction of rates by the private companies to a point where there seemed no necessity or justification for a municipal plant. These "yardsticks" provided by both municipal and Federal enterprises are so valuable that they alone would warrant PWA's expenditures for power undertakings. The municipal projects have caused private utilities to adjust their rates downward in wide

> areas and the Federal projects have brought about rate adjustments over still larger expanses of territory.

The Court will observe the words we have italicized in the above quotation. Yet three times in its brief (pp. 21, 53, 33) petitioner quotes this passage, each time omitting the important qualifying phrase which shows that the result referred to by the Administrator was "*an indirect one.*" Petitioner apparently justifies its truncated quotation on the basis of the similar form in which the passage was read to the Administrator by counsel for petitioner at the trial (R. 663).

The words which we have italicized in the above quotation are immensely significant. They show that the Administrator was stressing an indirect or collateral consequence of Public Works activities. In a book, written for popular consumption, concerning the accomplishments of the Administration of which he was the head, it was not to be expected that the Administrator would confine himself to the direct and primary effects of the program. It was well known that the Public Works Administration had put millions of people to work; doubtless the incidental and collateral effects of its program, also of public interest and importance, were less well known or understood.

There is admirable historic precedent for such reference to the collateral consequences of valid Federal activities. Thus Alexander Hamilton, in urging the enactment of legislation establishing

the Bank of the United States, in his first famous Report on that subject, dealt at length with the collateral advantages to the country of the creation of such an institution. When subsequently, after the legislation had been enacted by Congress, President Washington, seeking advice as to whether or not he should veto it, requested Hamilton to justify the constitutionality of the statute, Hamilton wrote his famous second Report. There he omitted all references to collateral consequences. His legal argument was to a large extent adopted by this Court [10] in its two celebrated opinions on the bank.[11]

Petitioner (Brief pages 22–23) quotes selected passages from the Administrator's testimony on cross examination dealing with the book, in an effort to make it appear (1) that the Administrator made the loan and grant to the county for the purpose of reducing the Duke Power rates because he thought them too high and (2) that his views on the subject of those rates were based on mere guesswork.

But petitioner quotes only a portion of the testimony from R. 654, omitting the following significant part of that testimony appearing a few lines below on the same page:

> I was interested in the Duke Power Company's rates because they had a bearing

[10] See the comment to that effect in *Farmers, etc. Nat. Bank* v. *Dearing*, 91 U. S. 29, 33.

[11] *McCulloch* v. *Maryland*, 4 Wheat., 316; *Osborn* v. *Bank*, 9 Wheat., 738.

> upon whether this project could be built and charge rates—sell enough power at those rates to liquidate its bonds to the Public Works Administration, with interest. It is true that the higher and more unreasonable the Duke rates were the better off we would be, so far as bondholders would be concerned, but that would not make the Duke rates reasonable.[12]

The Administrator further testified, in response to questions concerning statements in his book as to the Duke rates, that while he did not have the facts himself, he "had reason to believe that the rates charged by the Duke Power Company were excessive, based upon the cost of production" (R. 655). He "took the result of members of [his] staff" (R. 654) and made the statements in his book "on information and belief" (R. 655).

The references in the book to the protest of the Duke Power Company against the Greenwood County project are significant. The book stated that there had been bitter opposition from utility companies to the making of loans and grants for the building of municipal utility systems and private utilities had held up many such projects

[12] The Administrator immediately thereafter testified: "The unreasonableness of the rates was the concern of any individual; especially the concern of a Government official in my position" (R. 654). It is clear from the context quoted above that what he obviously meant was that, as Administrator, the unreasonableness of Duke's rates was his concern because that fact affected the loan.

for months. Typical, the book states, was the resistance to the Greenwood County project.[18] As already noted, the protest urged that the project would not be in the public interest (*supra*, p. 11), and the protest was supported, as the book points out, by emphatic representations on behalf of the Duke Foundation, a charitable organization holding approximately one-fourth of the stock of the Power Company. It was after the allotment had been approved by the President that this protest was received, and in consequence a hearing was held and the project reconsidered (R. 463). It was natural that in his book the Administrator should meet objections such as these, by showing that in fact the project would be in the public interest and that the effect on the Foundation would be negligible. While such a discussion may have no strict relation to the factors governing the administration of the public works provisions, it served to meet in the same realm of discourse objections voiced publicly by petitioner and others similarly situated.

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[18]At page 140 it is said: "The local power company concerned is the Southern Public Utilities Company, a subsidiary of the Duke Power system. The city of Greenwood, largest in the county, owns its own distribution system and purchases electricity from the Southern. The rural districts are without electricity and many of the local textile companies obtain their power from their own steam plants. Only 21 per cent of the total power proposed to be sold, according to the application from the county, was being furnished by the private utility."

The testimony of the witness Rose

Rose, a subordinate Public Works Administration engineer, was not, as petitioner suggests, a witness for that Administration. At the hearing before the Master, in June 1935, the Administrator, though a party, was not represented by counsel (R. 157) and called no witnesses.[14] Rose was called by defendant, Greenwood County, to testify to certain engineering features of the case and to that alone.

On direct examination by counsel for the County (R. 294–298), he testified with respect to engineering costs, depreciation, and the like, and said nothing about the Duke Power Company except the following:

> I have carefully examined the electric rate schedule of the Duke Power Company, and find only Block Meter Schedules except Schedule 10, which is applicable only to resale customers. Block meter rates for large industrial customers are 30 years behind in modern electric theory. Again the Duke Power Company has spent thousands of dollars, is now spending more thousands of dol-

[14] Judge Watkins, in his second opinion (R. 525) incorrectly stated that at the former hearings the Administrator had been represented by counsel and that "one of the witnesses produced by him" was Rose. It was true that the Administrator had been represented by counsel at the hearings (on questions of law) before Judge Watkins, but the evidence at the first trial was not heard by Judge Watkins, but by the Master, which explains Judge Watkins' inadvertently erroneous statement.

> lars, and stands ready to expend still more thousands of dollars to defeat this project. Therefore it is at once apparent that Duke Power Company recognizes a great deal of merit in the project (R. 298).

It was on cross-examination by petitioner's counsel that Rose gave his version of the power policy of the Public Works Administration (R. 299–300) which petitioner stresses in its brief. On re-direct examination, by counsel for the defendant County, he said (R. 307):

> As a matter of fact in determining whether a loan will be made by PWA it is necessary to compare the applicant's proposed rates with the existing rates in the territory on account of competition. PWA has to see whether applicant's rates are low enough to make it worthwhile to change, and high enough to liquidate the debt and earn it some surplus.

On the second trial before Judge Watkins on December 12, 1935 (R. II, 642–667), the Administrator testified that he had first heard of Rose's testimony a short time previously (R. 650); that Rose was an examining electrical engineer whose duty it was to investigate and report facts and who had no power to formulate policies or participate in their formulation or the manner in which applications should be passed on, or to fix rates or to speak for the Public Works Administration with respect to anything, policy included (R. 649).

The Administrator further testified that he had read the testimony of Rose and, asked for his comments thereon, said, "Well I think he was suffering from delusions of grandeur. He had no authority to expound, or determine or say, what the policy of Public Works Administration was and he certainly undertook to do that in large measure" (R. 649). The Administrator further testified that Rose's testimony with respect to rates was not a correct statement of the policy, intentions, or purposes of the Public Works Administration. "He may have been right in his figures on rates, which I am not competent to testify in respect to, but on policy he was not correct" (R. 649).

In this connection, the language of Judge Parker in his opinion in the earlier appeal before the Court of Appeals, as to the value of Rose's testimony, seems peculiarly appropriate. He said (81 F. (2d) 986, 996):

> * * * we feel that we would not be justified in disregarding the sworn testimony of a Cabinet Officer as to the policies which are being followed by him in the discharge of his official duties, and accepting instead mere press reports or the conflicting testimony of a minor official who may not have understood the purposes of his superior, who was the one charged with the formulation of policies and the exercise of discretion.

Press Release Number 989

Petitioner next refers to PWA Press Release No. 989, dated September 27, 1934. This press release is discussed at length at pp. 16 to 18, of the Government's brief in Nos. 84 and 85, and the discussion will not be repeated here. The memorandum of Colonel Waite, also referred to (Pet. Br. 27–28) is discussed in our brief in Nos. 84 and 85 at pp. 35–36.

Testimony concerning activities of the Electric Power Board of Review in relation to other projects

Substantially all the testimony introduced by petitioner at the recent trial before Judge Glenn relates to things said and written, out of the presence and without the knowledge of the Administrator, by two of his subordinates, Messrs. Rau and Hunt, two of the three members of the Electric Power Board of Review. That Board had been created by a written order of the Administrator dated May 9, 1934 (R. 574). That order, which constitutes the sole authority of the Board and its members, shows that it was authorized merely to gather information and give advice to the Administrator, supplemental to the advice given to him by his other subordinates, the three regular Examining Divisions of Public Works Administration (Engineering, Finance, and Legal). The Board's functions were not only purely advisory, but were,

by the Administrator's order, limited to power projects. It had no power to formulate policies or to take any action whatsoever in rejecting or approving proposed projects or in negotiating with cities or utility companies with respect to rates, or for the withdrawal of applications by cities. As the other subordinates of the Administrator advised him as to other aspects of the proposed power projects, the Board restricted itself primarily to a consideration of data as to rates. The Board was, by written order of the Administrator, dissolved on March 6, 1935, some 10 months after it was created (R. 713).

The following events, which occurred not long before that dissolution, are significant as emphasizing (1) the limited powers of Messrs. Rau and Hunt, (2) the fact that the Administrator was unaware of certain of their activities in excess of their authority, and (3) that, as soon as he learned thereof, the Administrator severely admonished them:

On December 18, 1934, the Board, per Hunt, wrote a letter to the Mayor of Hiram, Ohio (R. 699) which reads in part as follows:

> On the basis of available data it appears that the project will secure no economic advantage to the Village and that it would be more desirable to accept the Company's offer than to construct the proposed plant. If the applicant concurs in this conclusion the proper procedure will be to withdraw

the application as soon as it is clear that the new rates offered by the company will be put into effect.

Would you be good enough to advise me of the Village's disposition in the premises.

When this letter came to the attention of the Administrator, he wrote a memorandum to Mr. Hunt on January 30, 1935, which appears as Defendants' Exhibit No. 79 (R. 714). In it Mr. Hunt's attention is directed to the fact that the letter to the Mayor of Hiram, Ohio, was in excess of Hunt's authority and contrary to his instructions. Part of the Administrator's memorandum is as follows:

In setting up the Electric Power Board of Review, it was my thought that it should pass upon power projects and report to me in case of disagreement with the action taken by the P. W. A. staff. I never for a moment supposed that I was creating a body that, without consulting me, would overrule not only me, but the President, and assume the right of direct negotiation with the municipalities involved.

I would be glad to have you submit to me any facts which you think would make it my duty to rescind this allotment.

In the future the power of the Electric Power Board of Review will be strictly confined to what I originally intended them to be, namely the review of power projects and the making of reports and recommendations to me for my decision.

The trial court found that the Board was empowered only to obtain information and to make advisory reports to the Administrator (R. 784).

For a more complete discussion of the limited authority of the Electric Power Board of Review, and of Messrs Hunt and Rau, see the Government's brief in cases No. 84 and 85, *Alabama Power Co.* v. *Ickes,* pages 19–25.

The testimony introduced by petitioners as to the activities of Messrs. Rau and Hunt must be read with the foregoing in mind.

At the recent trial before Judge Glenn, petitioner called a number of witnesses who testified as to correspondence and conversations with Messrs. Rau and Hunt.

Edwin Vennard testified that he was in charge of the rate department of the Middle West Service Company in Chicago. Many of the cities in which operating units of Middle West were located had made applications for loans and grants for municipal electric projects. The Middle West Company was opposed to these loans and grants because of the damage that would ensue to its operating units, and was interested in preventing their approval (R. 603). Vennard stated that he saw a press release announcing that an Electric Power Board of Review had been created in the P. W. A., consisting of Mr. Hunt, Mr. Rau, and Mr. Cook (R. 591). As soon as Vennard heard about the creation of this Board he came to Wash-

ington to confer with the Board to see "if there was some way we could avoid having the loans and grants approved; to determine if by lowering the rates we could cause the projects to be not approved" (R. 603). As a result of a number of conferences with Hunt and Rau, Vennard stated that it was agreed that if a utility company would make a rate equal to or lower than the proposed municipal rate, the project would not be approved. At times during the discussion the general question of rate reduction was referred to in terms of "social desirability"—that is, it was stated that if the proposed municipal rate was higher than the rate the utility company put in effect the project would be lacking in social desirability and would not be approved (R. 604).

A number of letters and telegrams (between Vennard and Hunt) relating to applications for power projects by cities in divers parts of the United States, but having no relation to Greenwood County, were introduced in evidence by way of follow-up of the conferences testified to by Vennard. Another witness, Byerley, president of a power company, gave similar testimony as to other projects; and letters, to and from Hunt, with respect thereto (R. 606–610), and similar correspondence between Hunt and representatives of power companies as to still other projects, were introduced (R. 619–627).

George H. Carter, of Marlin, Texas, attorney for and director of the Texas Utilities Company,

gave similar testimony with respect to the applications of Marlin, Texas, and Plainview, Texas. After filing a protest against the granting of these applications, Colonel Carter and other representatives of his company met with Rau on March 1, 1935. The Plainview application had been filed prior to December 1933 (R. 618). The representatives of the Texas Utilities Company submitted to Rau a schedule of reduced rates that they proposed to put into effect in the two Texas cities. Colonel Carter testified that Rau looked at the proposed rate schedule and stated that if the company placed in effect its proposed rate reductions, the applications of the two cities would be rejected *because the projects could not pay out* (R. 617). An allotment of a loan and grant to the City of Plainview was, nevertheless, approved shortly after the first of March 1935 (R. 618). An exchange of letters and telegrams between Mr. Hunt and Colonel Carter leading up to the meeting on March 1, 1935 was introduced (R. 611–614).

Similar testimony with respect to the allotment to Coeur d'Alene, Idaho, was introduced through the deposition of Frank T. Post, president of the Washington Water Power Company.

Petitioner (Brief, pp. 23–24) points to the fact that the Administrator in a telegram to Post stated that if the Power Company put in effect a rate reduction equal to or greater than that of the city the "Electric Power Board of Review will consider matter further." Petitioner suggests that the Ad-

ministrator thus recognized that the Board was considering applications in the light of the alleged power policy and without regard to the bearing of rates on the question of the security of proposed loans, because the proposed bonds were general obligation bonds. But that suggestion ignores the important fact that the protest from Mr. Post, president of the local power company, stated (R. 584): "We have never seen any schedule of rates proposed by the city and it is impossible for the city to make this proposed project self-liquidating under schedules of rates lower than ours," and was followed shortly thereafter by a further protest which concluded with the following significant statement:

> * * * if the City of Coeur D'Alene should construct and operate the proposed system in competition with our Company, the inevitable result will be that each system will lose money and that the City, now in a precarious financial situation, will become bankrupt (R. 589).

Obviously, if that protest was correct, the operation of the City's proposed plant, since it would "bankrupt" the city (said to be in "a precarious financial situation"), would make it impossible for the city to meet its general obligation bonds payable out of taxes; and therefore the question of the relative rates of the private and proposed municipal projects was plainly a proper subject of consideration.

Furthermore, the telegram sent to Mr. Post merely shows that the Administrator was referring the question of rates to the Board for the purpose of having that Board *advise* him (not to take action itself), and there is nothing whatsoever in the telegram to show that he knew or believed that the Board was considering rates other than from the point of view of their effect on the security of the loan.[15]

Petitioner, having been given the opportunity to offer in evidence every single instance of an allot-

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[15] Petitioner (Brief, p. 32) refers to a letter, sent in March, 1936, from the Administrator to the Mayor of Coeur d'Alene, it saying that the letter is a clear acknowledgment that the Administrator had originally been pursuing an improper policy. But the letter in no manner bears out that assertion. There the Administrator stated that, when general obligation bonds are taken, "except in unusual instances where a bad investment by the city in a project may seriously impair its finances, P. W. A. has ignored the prospective revenues of the proposed project and therefore likewise ignored the rates of the cities and of its competitors." The letter states further that, because the Administrator had been occupied with a multitude of duties, he had failed to observe, at that time when the original loan and grant agreement was being considered, that the bonds of the city were to be general obligation bonds, and that there were no such unusual circumstances calling for any interest in rates. He further says that a short time before sending his letter of March 1936, his attention had been called to the facts, and he had reached the conclusion that the attitude expressed in the letters and telegrams sent by his subordinates (*i. e.*, a concern with rates in that instance) "was entirely unjustified" and he therefore "completely repudiated and abandoned it." He therefore offered the city a new contract which contained no provisions whatsoever with respect to rates.

ment for a power project throughout the United States, has found but this one instance where the Administrator concerned himself with rates in a case not involving revenue bonds but general obligation bonds; and in that instance, the case of Coeur d'Alene, the protest of the power company itself discloses ample justification for the consideration of rates in relation to the security of the bonds.

No letters were introduced which were written by Mr. Hunt or any other member of the Electric Power Board of Review after the receipt of the admonishing memorandum of January 30, 1935, with respect to Hiram, Ohio. It is true that Colonel Carter had his conferences with Mr. Rau with respect to the Marlin and Plainview, Texas, projects on March 1, 1935, and that Mr. Rau is alleged to have indicated at that time that if the company reduced its rates the applications would not be approved. It is significant, however, that, as above noted, the Plainview allotment was approved within a few days after the conference, in spite of Rau's alleged statement; and the Electric Power Board of Review was dissolved shortly thereafter, on March 16, 1935.

If it were suggested that the admonishing memorandum of January 30, 1935, was self serving, and prompted by the attack made in this type of litigation on the alleged improper policy of the Administrator and the efforts of power companies in

that litigation to show that he had approved the unauthorized conduct of the Board, the answer would be found in a scrutiny of the dates: On and prior to January 30, 1935, when that admonishing memorandum was sent to Hunt, no faint intimation had been made by any power company in any litigation to the effect that the Administrator's policy was evidenced by the conduct and statements of Hunt and Rau. Indeed, in the case at bar neither the original nor the amended bill (R. 2–19, 109–115) contains allegations charging anything like a "national power policy" of rate regulation; and petitioner's pleadings have in no wise ever referred to the activities of the Board or its members.

One further point should be made concerning the evidence with respect to the Electric Power Board of Review. It is clear from the testimony (and particularly of petitioner's witnesses, Vennard and Post) that insofar as the members of the Board undertook negotiations with the companies regarding comparative rates apart from their effect on the security of proposed loans, that activity operated to the advantage of the companies. An opportunity was thereby afforded the companies to delay the approval of allotments for eligible projects in the hope that the allotments might be entirely prevented. Consequently even if there had been negotiations of that sort with petitioner, as there were not, it is doubtful that petitioner would have been entitled to complain.

The testimony of the Director of the Power Division

On behalf of defendants, Clark Foreman, Director of the Power Division of PWA, was called as a witness. He testified that he was appointed Director of the Power Division on August 1, 1935, after dissolution of the Electric Power Board of Review and has been in charge of the Power Division continually since that time (R. 670). He further testified as follows (R. 670–672):

The function of the Power Division is to examine all applications for loans and grants to finance the construction of projects involving the generation, transmission, and distribution of electricity and gas and to make recommendations with respect thereto to the Administrator. The Division consists of three technical sections, a legal section, an engineering section, and a finance section. Before an application is recommended for approval the legal section must pass on its legality, the engineering section on its engineering soundness, and the finance section on the question of the reasonable security of the loan. In the case of a competitive project it is necessary to determine if the rates of the project are sufficiently low to secure business and sufficiently high to pay operating expenses and principal and interest on the loan when due. In the case of a loan secured by general obligation bonds, or in the case of a grant only, the Power Division has no interest in rates. No consideration

is given to the rates of a proposed municipal plant or of the existing private utility "for any purpose other than that of reasonable security" (R. 672).

With respect to "social desirability" Mr. Foreman testified:

> Under ordinary circumstances we assume social desirability when the application comes in from the city. If a protest is made on an application and it is pointed out that social desirability is lacking, then we carefully study that protest, as we do all protests. But our invariable rule is that social desirability of a project is to be determined by the city itself, that is to say, the applicant (R. 672–673).[16]

Since Mr. Foreman has been Director of the Power Division he has frequently discussed matters of policy with the Administrator. There has been no change in policy since his appointment (R. 673).

He testified that the loan and grant agreement with Greenwood County is typical of PWA contracts in revenue bond cases and the contract with Sandusky, Ohio, defendants' Exhibit No. 84, is typical of PWA contracts in general obligation bond cases. All contracts in power cases were changed to one or the other of those forms shortly after he became Director of the Power Division (R. 673). The significant point is that under those

[16] See further as to "social desirability", the Government's brief in Nos. 84 and 85, pp. 32–35.

forms of contracts, no provisions are made with respect to rates in any case not involving a loan, and in the case of a loan, only when it is evidenced by revenue bonds.

Mr. Foreman testified that more than 500 applications for gas and electric projects have come under his supervision during the time that he has been Director of the Power Division and that he has had a great deal of correspondence with respect to these projects (R. 671). It is therefore significant that plaintiffs were able to find but one letter, plaintiffs' Exhibit No. 74, written by Mr. Foreman, which had any discussion of the question of rates. This was a letter written to the City Clerk of Eldon, Iowa, on October 22, 1935 (R. 702). Mr. Foreman testified (R. 684) that the letter was written because the Iowa Power Company, in its protest, had stated that the proposed rates of the project would be the highest of any town of its size in the State of Iowa. He felt that this information should be passed on to the City for whatever action it desired to take. He received in reply a letter from the City Clerk of Eldon, Iowa, dated October 24, 1935, which appears as defendants' Exhibit No. 87 (R. 684–686). The City explained why the proposed rates were set up and insisted that the application be approved on that basis. After the receipt of this letter, *PWA acceded to the City's desire in the matter,* made an

allotment, and entered into a loan and grant agreement with the City (R. 686).

It is noteworthy that though petitioner's search covered a wide area extending all the way from Mount Dora, Florida, to Coeur d'Alene, Idaho, they were able to find but one letter from any member of the PWA after the date of the creation of the Power Division on August 1, 1935, which might even be remotely considered as indicating any undue interest in rates not related to the security of the loan.

If any inference could be drawn from the testimony of petitioner's witnesses, that in making loans and grants the Administrator acted pursuant to an improper policy, such inference is dispelled by the action of the Administrator with respect to the Electric Power Board of Review. (*Supra*, pp. 46–48). It is also dispelled by the uncontradicted testimony of Mr. Foreman, Director of the Power Division, with respect to policies known to and concurred in by the Administrator, and the testimony of Mr. Foreman concerning the disposition actually made of the applications to which petitioner's evidence related. He testified with respect to each of those projects dealt with by Hunt and Rau as to which testimony had theretofore been introduced by petitioner. His uncontradicted testimony (R. 673–676) was that as to five of these projects, the cities had subsequently voluntarily

withdrawn their applications; as to four, loan and grant agreements had subsequently been made, or PWA's offer had not been accepted; as to three, the applications had either been withdrawn or rejected; and as to three, the applications had been rejected; in two cases because of financial insecurity and in one because of legal defects. It is clear from Mr. Foreman's testimony that the action taken with respect to each of those projects had been without regard to the policy expressed or alleged to have been expresesd by Messrs. Hunt or Rau or the Board.

Petitioner made no effort to show that the action taken on the applications referred to in the testimony of Mr. Foreman, and previously referred to by its own witnesses, was determined or influenced by the rate policy of the private companies, apart from the effect of those rates on the security of the loan.[17]

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[17] Petitioner (Brief, p. 28) refers to Vennard's testimony that in the case of Dowagiac, Michigan, the application of that city had been rejected when his company made a reduction of rates, and that Foreman testified that later the application was approved. Petitioner then states that it appeared that this had not occurred until after the City had made a further reduction in rates which Mr. Vennard's company had been unable to meet, citing R. 605, where Vennard testified solely with reference to a conversation with Hunt. There is no evidence to show that the Administrator was aware of this conversation with Hunt, or that Foreman knew of it or acted with reference to it when recommending to the Administrator the action which the latter took in approving the City's application.

The effect of statements of members of the Electric Power Board of Review in the light of their limited authority and of the Administrator's action

It is to be noted that all of the new evidence offered by petitioner, in support of its charges as to the alleged improper power policy of the Administrator, relates to the activities of two of his subordinates, Messrs. Hunt and Rau, who were two of the three members of the so-called Electric Power Board of Review. It clearly appears from the evidence that the Board was given very limited *express* authority, viz: to *advise* the Administrator, and no power whatsoever *to act* with respect to applications for loans and grants. That severely limited express authority cannot by any possibility be said to have given those subordinates any *implied* authority to act.[18]

They therefore had no actual authority to negotiate for a reduction of power rates, or to persuade cities to withdraw their applications. Nor can

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[18] "The power of an agent to bind his principal by making an admission against the interest of the principal is not a part of the law of evidence, but part of the substantive law of agency." *Calzavara* v. *Planet, S. C. Corporation*, 31 Fed. (2d) 885, 887 (C. C. A. 4).

"It cannot be too often pointed out that the mere fact that one employs others to work for him does not make him chargeable with what they may say about him or his affairs while in his employ. If he employs them to talk for him, a different case may be presented." *Gordon* v. *Thomas*, 70 Fed. (2d) 752, 753 (App. D. C.).

their expressions as to policy be imputed to the Administrator for, as shown above, they had no authority to formulate policy. The doctrine of apparent authority—based upon estoppel and reliance—cannot be availed of by petitioner to enlarge their actual authority, for there is no evidence that petitioner, to its detriment, relied in any way upon any statement made or things done by Hunt or Rau. Nor can petitioner assert any acquiescence, adoption or approval on the part of the Administrator in things said and done by them, in excess of their authority, out of his presence and without his knowledge; there is no evidence whatever that he knew of their acts and negotiations, in excess of their authority, until January 30, 1935, when he wrote the memorandum with respect to Hiram, Ohio, admonishing Hunt and the Board that they had been exceeding their authority and should cease to do so; and shortly thereafter, he abolished the Board. Of course a principal cannot be deemed to have ratified or acquiesced in conduct of an agent in excess of the agent's actual authority, unless the principal is fully aware of such conduct of his agent.

Petitioner (Brief p. 37) states that the record shows that, with reference to the Greenwood County project, Hunt and the Board were acting not only with the knowledge but under the specific direction of the Administrator. But there is nothing whatsoever in the evidence to show that, with respect to the Greenwood County project, Hunt or

the Board did anything other than to gather information and advise the Administrator with respect thereto.[19] The only evidence as to their action appears at R. 463–465, 467 (Def. Ex. 57) or in the Administrator's book, and shows that they were exercising purely advisory powers with respect to that project.

Even if the evidence had shown, as it does not, that the Administrator had followed the views of Hunt and Rau with respect to some other applications than that of Greenwood County and had, on that basis, rejected such other proper applications, that proof would have been irrelevant. For the mere fact that with respect to some other municipality the Administrator had failed and refused to comply with the statute would have no bearing in this case where he has complied with the statute and where the most that can even be charged is that, in addition to applying the criteria set forth in the statute, he found that the project satisfied a further and irrelevant criterion.

Petitioner (Brief, pp. 34–37) states "The evidence showing that the loan and grant in question was made as a part of the general plan to lower power rates was admissible," and under that heading quotes authorities as to the admissibility of evidence tending to show a plan. But that discussion is beside the point, for the trial court admitted

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[19] There is no evidence in the *Alabama Power* cases that the Board took any action (advisory or otherwise), with respect to the cities whose applications are there involved.

all of the evidence on that subject offered by petitioner; and, as above shown, it did not prove the existence of such a plan.

For, whatever inferences may be drawn from the letters and statements of certain subordinates, the evidence shows that the views of these subordinates as to policy had no effect on the action of the Administrator. More significant is that, as shown above, when it first was made known to the Administrator that Messrs. Hunt and Rau were exceeding their express authority, he admonished them to refrain from such conduct and expressions of opinions, and that they should limit themselves to the authority given them, i. e., merely to advising him. There is evidence, above noted, that not long after that admonition these subordinates seem again to have exceeded their authority, but within two weeks of that conduct the Board was abolished.

We submit that the evidence amply supports the findings of the trial court that in making the allotment of funds to Greenwood County, the Administrator had no purpose other than that set forth in the Acts of Congress and that his policy was an entirely proper one (Fdg. 18, R. 788).

III

THE IRRELEVANCE OF THE ALLEGED IMPROPER PURPOSE OR MOTIVE OF THE ADMINISTRATOR

We have already discussed, in the Government's brief in Nos. 84 and 85 (pp. 171–180) the irrelevance of the alleged improper policy, purpose or

motive of the Administrator. Since, however, petitioner herein, even more emphatically than petitioner in those cases, advances contentions which demonstrate that irrelevance, we shall discuss those contentions briefly.

At the first trial and on the first appeal, before the loan and grant agreement was made, petitioner asserted that the Administrator's alleged improper motive or purpose or policy was made effective through the rate provision contained in the original agreement, requiring the adoption by the county of a rate resolution satisfactory to the Administrator as a condition of receiving any part of the loan and grant. The new loan and grant agreement entirely eliminates such a provision.[20] Petitioner has accordingly altered its contention and takes two inconsistent positions:

(1) Petitioner contends, first, that the original policy of the Administrator when making the first agreement was improper, and that no subsequent change in the agreement could purge that impropriety. The argument rests upon an erroneous assumption of fact: That the adoption of the county's initial rate resolution and the contracts it made with certain of petitioner's customers were instigated by the Administrator and later approved by him. The uncontradicted evidence and the find-

[20] We do not wish to be understood as conceding that such a provision concerning resale rates is invalid. We merely point out here, as in our brief in Nos. 84 and 85 (p. 171, note 61), that this question is irrelevant to a decision of the cases at bar.

ings are, however, to the contrary. The rates were determined by the county, without consultation with P. W. A., before it applied for a loan and grant, and its original rate resolution, based upon that determination, was adopted before the first loan and grant agreement was made and was never approved by the Administrator; the Administrator did not require contracts for sale of power to be made; they were made before the first loan and grant agreement was executed and without consultation with the Administration, and have never been approved by or submitted to the Administrator (see *supra,* pp. 19–20). Starting with those incorrect factual assumptions, petitioner's argument goes on to stress the fact that the allotment for the project is unchanged and that, after the termination of the first loan and grant agreement, the county again considered its rates and adopted the same rate schedule which it had previously proposed. This argument overlooks the fact that this subsequent action of the county was taken voluntarily without any prompting or suggestion from the Public Works Administration and in accordance with the requirements of the South Carolina statute that rates should be "revised from time to time" (S. C. Acts, 1933, No. 299, sec. 21, Appendix, p. 67; R. 730). The action of the county was taken, and necessarily so, without regard to any provision contained in the abandoned loan and grant agreement. In these circumstances, a court of equity

will not grant injunctive relief on the basis of the original abandoned provision regarding rates, since there can be no threat of future action thereunder.[21] See *Industrial Association* v. *United States,* 268 U. S. 64, 84; *Barker Painting Co.* v. *Local No. 734,* 281 U. S. 462, 463–464; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 412, 413; *Nashville C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405, 415; *Hicklin* v. *Coney,* 290 U. S. 169, 172–173. In *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, the Court said (p. 325):

> Examining the present record, we find no ground for a demand by plaintiffs except as it related to the contracts between the Authority and the Alabama Power Company. *And as the contract of May 21, 1934,* with the Electric Home and Farm Authority, Inc., *and that of August 9, 1934,* for an option to the Authority to acquire urban distribution systems, *are understood to be inoperative,* the only remaining questions that plaintiffs are entitled to raise concern the contract of January 4, 1934, providing for the purchase of transmission lines and the disposition of power. [Italics added.]

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[21] *Horbach* v. *Coyle,* 2 F. (2d) 702 (C. C. A. 8th), cited by petitioner (Br. p. 50), is inapplicable on its facts. There, the court held that "A new agreement in furtherance of and for the purpose of *carrying into effect any unexecuted provisions of a previous illegal agreement* is likewise illegal and void." That doctrine is obviously inapplicable to the case at bar. Here—even assuming that the prior loan and grant agreement was in any manner invalid—the provisions thereof, asserted by petitioner to be invalid, have been wholly eliminated.

2. Petitioner contends, in the second place, with apparent recognition of the weakness of its first contention, that, regardless of the existence of an improper purpose or intention or policy on the part of the Administrator, the damage to it will be the same; for in any event, without regard to any improper policy on the part of the Administrator, the county, if it receives the loan and grant, will be enabled to construct a system which it will operate in successful competition with that of the petitioner (Pet. Br. 53; also, 63–64, 73–74). This contention is, of course, inconsistent with the first and destructive of it.[22] For if the act complained of is the making of the loan and grant as such, without regard to the purposes or intentions of the Administrator, any discussion of an alleged improper purpose, plan or policy is manifestly irrelevant. Petitioner thus properly recognizes that the Administrator's mental attitude, by whatever name called, can neither add to nor detract from its rights or grievances.

Petitioner in speaking of the alleged "intentions" or "motives" or "policy" or "standards" or "criteria" of the Administrator is, of course, but borrowing from the thesaurus divers ways of

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[22] Judge Soper in his first dissent in *Duke Power Co.* v. *Greenwood County*, 81 F. (2d) 986, adopted petitioner's original thesis with respect to the Administrator's alleged motives; in his second dissent in *Duke Power Co.* v. *Greenwood County*, 91 F. (2d) 665, 675, he has accepted petitioner's present inconsistent positions with respect to those alleged motives.

referring to the Administrator's mental attitude. In short, petitioner's argument comes to this: that if an officer is complying with a valid statute, and is intelligent enough to be aware of the inevitable and foreseeable collateral consequences of his compliance with the statute, and contemplates those consequences with satisfaction, and if those consequences are such that, had Congress based the statute solely on those grounds, it would have been invalid, then the conduct of the officer is unlawful. That is precisely the argument which this Court has repeatedly rejected. *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288; *Anicker* v. *Gunsburg,* 246 U. S. 110, 120; *West* v. *Hitchcock,* 205 U. S. 80, 85–86; *De Cambra* v. *Rogers,* 189 U. S. 119, 122. (These cases are discussed in the Government's brief in Nos. 84 and 85, pp. 174–177.)

There are, of course, cases holding that, if an officer, mistakenly interpreting a statute, threatens action *violative of the statute,* and his threatened conduct is such that, if it were authorized by the statute, the statute itself would be unconstitutional, the threatened *conduct* may be held to be in violation of the statute and also unconstitutional.[23] But

[23] In *American Bank and Trust Co.* v. *Federal Reserve Bank,* 256 U. S. 350, it was alleged that the Reserve Bank accumulated drafts on the plaintiff bank and required payment in cash, instead of presenting them in the usual course, and that this action had no legitimate business reason. This

there it is the threatened objective conduct of the officer, not his mental attitude, which is invalid. And the doctrine of such cases has no bearing here, since here (as in the *Isbrandtsen-Moller, Ashwander* and *Dakota Telephone* cases, *supra*) the officer is not violating but is correctly interpreting and acting in compliance with the statute, which, as has been shown in our brief in Nos. 84 and 85, is itself constitutional.

IV

THE STANDING OF PETITIONER TO CHALLENGE THE VALIDITY OF THE FEDERAL STATUTE OR TO ASSERT A VIOLATION THEREOF

The Government has argued this question at length in its brief filed in the Alabama Power cases (pp. 62 to 104) and the argument will not be repeated here. We shall, however, discuss briefly a few of the authorities relied on by petitioner herein and not referred to in Nos. 84 and 85.

Other cases cited by petitioner

Petitioner (Brief, p. 81) cites *Warner-Quinlan Asphalt Co.* v. *Carlisle,* 158 App. Div. 638, 144 N. Y. Supp. 70. There a manufacturer was held entitled to sue to prevent the award of a public contract to a competing manufacturer, on the ground that the statutory provision requiring com-

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Court held that such a course of conduct was in excess of the statutory authority of the Reserve Bank. Upon a trial, the allegations were not established, and the bill was dismissed. 262 U. S. 643.

petitive bids had been evaded. The statute itself required "that there be fair and reasonable opportunity for competition," and the court held that this right to compete could be protected by injunction. In the case at bar, the petitioner has no right to be free of the voluntary and lawful competition of the county.

Petitioner also (Brief, p. 82) cites two cases dealing with nuisances. In *Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91, relief was denied to a plaintiff who sought an injunction against an alleged nuisance, and made no averment or showing of any special damage to it. The Court in a dictum stated that what constituted a public nuisance for which a citizen could bring no action might also constitute a private actionable nuisance, if the plaintiff showed actual damages to himself; obviously the case merely holds that an action for nuisance does not lie in the absence of damage to the person complaining, but that where there is such actual damage, then there is a familiar wrong. The court discussed the other case cited by petitioner, *Corning* v. *Lowerre,* 6 Johns Ch. 439, which was an action for nuisance between two private persons; the defendant was building a house upon a public street and thereby causing special damage to the plaintiff; the court held that although the conduct of the defendant constituted a public nuisance, it was also a private nuisance and actionable as such. It is difficult to perceive how those cases have any bearing on the case at bar.

V

THE CONTENTION THAT THE DISTRICT COURT ERRED IN RECEIVING NEW EVIDENCE

Petitioner contends (Br., pp. 78–79, 54, 15) that the cause should have been considered and determined upon the record made at the first trial prior to the entry of Judge Watkin's original decree of August 26, 1935. That contention not only misconceives the purport of this Court's decree vacating the prior decrees and ordering a remand (299 U. S. 259), but is in effect a contention that this Court erred in its prior decision.

1. The decision of this Court in 299 U. S. 259, furnishes, we submit, complete authority for the scope of the new hearing. It will be useful in this connection to recall briefly the proceedings leading up to the decision of this Court.

The original decree of Judge Watkins was entered August 26, 1935 (R. 484–485). Respondents appealed therefrom, but on motion of respondent Ickes (R. 492) the Court of Appeals remanded the case for further trial (R. 515–518). Judge Watkins, on the second trial, received and reported further evidence offered by petitioner and respondent, both as to matters occurring prior to and since the decree of August 26, 1935, but held that he could consider only the evidence as to matters which had occurred subsequent to that decree, and entered a second decree reaffirming the first decree (R. 520, 527–528). When the case again came before the Court of Appeals, that court held that

Judge Watkins' ruling was erroneous, and it accordingly considered all the evidence in the record and reversed both decrees, 81 F. (2d) 986. On certiorari, this Court held that the Court of Appeals had erroneously failed, in its remand order, to direct that the decree of August 26, 1935 should be "vacated", and that as a result, "the District Court *did not understand that it was revested with complete jurisdiction*" and that "instead of considering the order of the Circuit Court of Appeals as tantamount to a vacatur of the former decree, and as operating to *revest the court with jurisdiction of the entire cause* and imposing the duty to permit proper amendment of the pleadings and a retrial and complete determination of the cause, considered its former decree as still effective, deemed the competent evidence on the new hearing to be restricted to a narrow point, and ended the proceeding with a decree simply adjudging that the original decree should not be set aside." [Italics added]. (299 U. S. at 268, 267.)

The "narrow point" to which the District Court had thus erroneously restricted the hearing is the same narrow point to which petitioner now insists the third trial should have been limited. As the Court of Appeals said in its latest opinion in this case (91 Fed. (2d) 665, 668):

> The setting aside of the decrees in the District Court left the cause in precisely the position that it would have occupied if no final decree had ever been entered; and

we think there can be no doubt as to the power of the court in an equity cause, until final decree has been entered, to hear additional evidence and modify or set aside any finding of fact theretofore made. *Forniquet* v. *Perkins,* 16 How. 82; 14 L. Ed. 854; *Glades County* v. *Detroit Fidelity & Surety Co.* (C. C. A. 5th), 65 Fed. (2d) 252; *Wagner* v. *Meccano* (C. C. A. 6th), 235 Fed. 890; *Dangerfield* v. *Caldwell* (C. C. A. 4th), 151 Fed. 554. The opinion of the Supreme Court determines none of the issues raised in the cause, but directs that, after the pleadings shall have been amended, it "be retried upon the issues then presented"; and it is well settled that the granting of a new trial by an appellate court reopens every issue in the case, except as to questions definitely and finally determined upon the appeal. *American Surety Co.* v. *Jackson* (C. C. A. 9th), 26 Fed. (2d) 248; *Shell Petroleum Corp.* v. *Shore* (C. C. A. 10th), 80 Fed. (2d) 785; *Glades County* v. *Detroit Fidelity & Surety Co., supra;* Cyclopedia of Federal Procedure, vol. 6, p. 820.

See also *Rogers* v. *Hill,* 289 U. S. 582, 587–588; *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, 182; *Mutual Life Ins. Co.* v. *Hill,* 193 U. S. 551, 553–554.

It is clear that petitioner's position is precisely that taken by Judge Watkins at the second trial and which this Court held to be erroneous.

2. Petitioner, however, goes further in its contention and argues that not even the new loan and grant agreement should have been considered at

the hearing following this Court's decision. That argument is premised upon an allegation of law contained in the motion to remand made by the Administrator in the Circuit Court of Appeals on the first appeal. The argument is that the motion contained an allegation to the effect that Judge Watkins had held certain provisions of the old agreement to be in violation of South Carolina law and that the new agreement had eliminated those provisions; accordingly, it is argued that the Administrator sought merely an opportunity to introduce into the record the new agreement for the sole and limited purpose of showing that those provisions had been eliminated, and it is asserted that the allegation in the motion concerning Judge Watkins' decision was, as a matter of law, erroneous, so that at the most recent trial there was no occasion to receive any evidence not contained in the record made at the original hearing.

This argument of petitioner is necessarily an argument that this Court itself erred in directing the vacation of the decrees and remanding the cause for, if the allegations of the Administrator's motion to remand were in fact erroneous, that would have been apparent on the face of the record before this Court. Petitioner states (Br. —, 87):

> This court remanded the cause for retrial solely on the *allegation* of the motion of the Administrator that Judge Watkins had held that certain provisions of the contract of December 8, 1934, were in excess of

> Greenwood County's authority under the laws of South Carolina and that these provisions had been eliminated by substitution of the new contract of November 30, 1935. Upon the cause being remanded respondents failed to establish this allegation of their motion. Hence the entire basis for a retrial failed. [Italics in original.]

Whether the allegation concerning the basis of Judge Watkins' decision was correct or not was a matter which was open to the consideration of this Court when the case was before it, for the only evidence concerning the basis of Judge Watkins' decision was contained in his opinion, findings and conclusions, together with the decree entered thereon. Thus petitioner is in substance asserting that this Court should not have ordered the cause remanded but should have decided it on the prior record. Such a contention coming now for the first time can manifestly have no persuasive force.

It should be pointed out, moreover, that as a matter of fact the motion of the Administrator for a remand was not restricted in the manner asserted by petitioner. It is true that the motion did contain an allegation that the new agreement had eliminated provisions of the old agreement which Judge Watkins had held to be in violation of South Carolina law.[24] But the prayer of the motion was

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[24] It should also be pointed out that the allegation in the motion to remand concerning the holding of Judge Watkins as to South Carolina law was not, as petitioner asserts,

not based solely upon that allegation. The motion referred to (R. 493) and incorporated the new loan and grant agreement (R. 494–514), a new and supervening fact. The motion prayed (R.

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erroneous. For Judge Watkins held, in effect, that the rate provision of the original agreement required the County to fix rates satisfactory to the Administrator and maintain them without change thereafter. (R. 122; cf. R. 522–523.) While the respondents believed that to be an erroneous interpretation of that provision of the old agreement, nevertheless, if it was a correct interpretation, then that provision violated the statutes of South Carolina, which provide that rates in connection with such revenue bonds "shall be fixed and revised from time to time." (Act 299, 1933, Appendix, p. 67.) Moreover, Judge Watkins made findings (R. 121, 480) to the effect that the old agreement contained provisions—abandoned in the new agreement—giving the Administrator control of many matters relating to the construction of the project, with the clear implication that those provisions constituted a delegation by the County of its powers, violative of South Carolina law.

Petitioner (Brief, p. 54) argues that Judge Watkins could not have been passing on any question of South Carolina law, since in his opinion in connection with his first decree (R. 125) he referred to the decision in favor of Greenwood County by the Supreme Court of South Carolina in the case of *Park* v. *Greenwood County*, 174 S. C. 35. But the court in the *Park* case did not pass on the provisions of the loan and grant agreement, since that agreement was not before the court in that case, as appears from the pleadings in that case contained in the present record (R. 34–62). Subsequently the Supreme Court of South Carolina, in *Clarke* v. *South Carolina Public Service Authority*, 177 S. C. 421, held that the loan and grant agreement before the court in that case, and containing provisions in many respects similar to that involved in the case at bar, was not violative of South Carolina law. But the *Clarke* case was decided September 10, 1935, after Judge Watkins' original decree had been entered.

493) that the cause be remanded to the District Court with leave to the parties to amend their pleadings in accordance with the facts set forth in the motion (i. e., including the making of the new agreement), and for a trial or other disposition of the cause on such amended pleadings. The attention of the Court of Appeals was thus called to a new and supervening fact, the new agreement, and on the basis of that fact and the prayer, the Court of Appeals in its mandate, after referring to the prayer of the Administrator's motion, ordered the cause to be remanded, to the end that the District Court might reconsider its decision in the light of the new agreement and take such further action as might be appropriate in the premises. (R. 517; and see 81 F. (2d) 986, 989–990, and 91 Fed. 665, 668.) And when the case came to this Court, it held that, while the Court of Appeals had erred in not directing the vacation of the first decree, it had otherwise acted properly in remanding the cause, and accordingly this Court, on the basis of the new and supervening fact and the prayer of the Administrator's motion, directed that both decrees of Judge Watkins should be vacated and the cause remanded for further trial. In no manner did this Court limit the scope of that trial to the question whether the new contract had eliminated provisions which Judge Watkins, in connection with his first decree, had held to be a violation of the South Carolina law. The Administrator was entitled to

the relief asked in the *prayer* of his motion if the facts (i. e., the new agreement) set forth therein justified that relief. Cf. *Lockhart* v. *Leeds,* 195 U. S. 427, 436, 437; *Tyler* v. *Savage,* 143 U. S. 79, 98; *Jones* v. *Van Dorn,* 130 U. S. 685, 692; *Story's Equity Pleading* (10th Edition), Section 40. The allegation as to the effect of Judge Watkins' decisions was *an allegation of law not of fact,* and accordingly, had no force or effect. *St. Louis Railroad* v. *United States,* 267 U. S. 346; *Interstate Land Company* v. *Maxwell,* 139 U. S. 569, 578.

3. The authorities cited by petitioner (Br., pp. 87–88) have no application here. The cases cited at page 87 are all cases dealing with bills of review. In each of those cases it was held that the plaintiff had not made out a case entitling it to file a bill of review, which sought the vacation of a prior decree, and in each one of those cases this court refused, on that ground, to vacate the decree. No bill of review has been filed in this case, and the action taken by this court in vacating the decrees was not based upon the doctrines applicable to a bill of review. Petitioner, in effect, is therefore contending that this court erred in its prior decision when it ordered that the decrees should be vacated. The case of *Board of Supervisors of Wayne County* v. *Kennicott,* 94 U. S. 499, s. c., 16 Wall. 452, from which petitioner has quoted a limited excerpt, does not support its position. That case held that where this Court had reversed the de-

cree below on the merits and ordered a new trial, this Court would not again consider the issues previously decided by it when the case reached it on the second appeal. In the case at bar, in contrast, there has been no decision of any issue by this Court.

CONCLUSION

For the foregoing reasons, the decree of the Circuit Court of Appeals, affirming that of the District Court, should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 397.—October Term, 1937.

Duke Power Company and Southern Public Utilities Company, Petitioners,
vs.
Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 3, 1938.]

Mr. Justice Sutherland delivered the opinion of the Court.

This case presents the same question as that just decided in Nos. 84 and 85. The respondents are essentially the same, with the addition of Greenwood County, in the State of South Carolina, and the members of the finance board of the county. The suit was brought to enjoin the construction and operation of a local electric power plant in the county, and the making of a loan and grant by the federal administrator to the county, for that purpose, under the provisions of Title II of the National Industrial Recovery Act, set forth, so far as material, in Nos. 84-85, *supra*.

The case was here on a previous writ, upon consideration of which this court, because of substantial irregularities in practice, reversed the judgment of the court below with directions to vacate the decrees entered by the district court, and remand the cause to that court with directions to permit the parties to amend their pleadings in the light of existing facts, and retry the cause upon the issues then presented. We expressed no opinion upon the merits or the relevancy or effect of the evidence. 299 U. S. 259. Accordingly, the case was remanded to the district court, and reheard. The district court, after making findings of fact and conclusions of law, dismissed the bill. The court below, upon appeal, considered the case fully, and delivered an exhaustive opinion. It held (1) that the statute, under which the administrator proposed to act, was constitutional; (2) that he acted within the power granted him by the statute; and (3) that in any event no legal right of plaintiffs was violated by what had been done. 91 F. (2d) 665; see also preceding decision, 81 F. (2d) 986.

Upon the question of petitioners' standing to maintain the suit, the lower court held, in substance, that the competition proposed by the county was lawful and that even though the administrator were without authority to make the proposed loan and grant, no legal right of petitioners was thereby invaded. The opinion upon this branch of the case is in harmony with the views we have just expressed in Nos. 84 and 85; and it follows that the decree must be, and it is,

Affirmed.

Mr. Justice BLACK concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.